

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record. 3

(IN TWO VOLUMES.)

WILLIAM REID and WILBUR P. REID, Part-
ners Doing Business Under the Firm Name
and Style of NATIONAL COLD STORAGE
and ICE COMPANY,

Plaintiffs in Error,

vs.

H. A. BAKER,

Defendant in Error.

VOLUME I.

(Pages 1 to 256, Inclusive.)

Upon Writ of Error to the United States District
Court of the District of Oregon.

FILED

FEB 5 - 1923

F. D. MONCKTON

CLERK

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amended Complaint	5
Answer to Amended Complaint	10
Assignments of Error	22
Bill of Exceptions	29
Certificate of Clerk U. S. District Court to Transcript of Record	520
Citation on Writ of Error	1
DEPOSITION ON BEHALF OF PLAINTIFF:	
THEIS, MATTHEW H.	237
Redirect Examination	269
Recross-examination	270
SLAUGHTER, PETER J.	271
Redirect Examination	295
EXHIBITS:	
Plaintiff's Exhibit No. 3—Letter Dated July 15, 1920, H. A. Baker to National Ice & Cold Storage Company	498
Plaintiff's Exhibit No. 3 Attached to De- position of H. Theis—Letter Dated No- vember 17, 1920, National Cold Storage & Ice Company to John Sexton & Com- pany	511
Plaintiff's Exhibit No. 4—Telegram Dated	

	Index.	Page
EXHIBITS—Continued:		
August 16, 1920, H. A. Baker to National Cold Storage & Ice Company . . .		499
Plaintiff's Exhibit No. 4 Attached to Deposition of Peter J. Slaughter—Fruit Contract Dated January 8, 1920		516
Plaintiff's Exhibit No. 5—Telegram Dated August 21, 1920, National Cold Storage & Ice Company to H. A. Baker		499
Plaintiff's Exhibit No. 6—Statement Dated October 31, 1920, National Cold Storage & Ice Company to H. A. Baker . . .		500
Defendants' Exhibit "A"—Letter Dated September 7, 1920, H. A. Baker to National Ice & Cold Storage Company . . .		501
Defendants' Exhibit "B"—Letter Dated September 10, 1920, National Cold Storage & Ice Company to H. A. Baker		503
Defendants' Exhibit "C"—Letter Dated September 16, 1920, National Cold Storage & Ice Company to H. A. Baker		505
Defendants' Exhibit "D"—Letter Dated August 9, 1920, National Cold Storage & Ice Company to H. A. Baker		506
Defendants' Exhibit "E"—Letter Dated August 25, 1920, H. A. Baker to National Cold Storage & Ice Company . .		507
Defendants' Exhibit "F"—Letter Dated September 11, 1920, H. A. Baker to		

Index.

Page

EXHIBITS—Continued:

National Ice & Cold Storage Company	508
Defendants' Exhibit "G"—Letter Dated October 5, 1920, H. A. Baker Inc., to National Ice & Cold Storage Company	510
Instructions of Court to Jury	492
Judgment	19
Minutes of Court—June 15, 1922—Judgment ..	19
Minutes of Court—December 26, 1922—Order to Send Certain Original Exhibits to Circuit Court of Appeals as Part of Bill of Exceptions	519
Names and Addresses of Attorneys of Record..	1
Order Extending Time to and Including December 30, 1922, to File Record and Docket Cause	522
Order Extending Time to and Including January 3, 1923, to File Record and Docket Cause	523
Order to Send Certain Original Exhibits to Circuit Court of Appeals as Part of Bill of Exceptions	519
Petition for Writ of Error	20
Praecipe for Transcript of Record	27
Reply	15
Stipulation to Send Certain Original Exhibits to Circuit Court of Appeals as Part of Bill of Exceptions	517
Supersedeas Bond.....	25

	Index.	Page
TESTIMONY ON BEHALF OF PLAIN-		
TUFF:		
ADOLPH, DAVE		83
Cross-examination		86
BAILEY, R.....		112
Cross-examination		115
BAKER, H. A.		150
Cross-examination		182
Redirect Examination		205
Recross-examination		207
Redirect Examination		210
Recross-examination		212
BAUER, GEORGE.....		119
Cross-examination.....		121
Redirect Examination.....		122
Recross-examination.....		123
GREGG, L. B.....		77
Cross-examination.....		80
Redirect Examination.....		83
HECKERT, G. F.....		59
Cross-examination.....		61
HICKS, L.....		124
Cross-examination....		125
HUFFMAN, G. M.....		50
Cross-examination.....		56
Redirect Examination.....		58
HUNTLEY, L. H.....		36
Cross-examination.....		41
Redirect Examination.....		48
Recross-examination.....		49
IRELAND, GEORGE N.....		88
Cross-examination.....		99

	Index.	Page
TESTIMONY ON BEHALF OF PLAIN-		
TIFF—Continued:		
	Redirect Examination.....	101
IRELAND, ROBERT.....		215
	Cross-examination.....	218
	Redirect Examination.....	221
	Recross-examination.....	222
	Redirect Examination.....	224
JOHNSON, G. W.....		64
	Cross-examination....	70
	Redirect Examination.....	74
	Recross-examination.....	75
	Redirect Examination.....	76
KELLY, N. H.....		126
	Cross-examination.....	129
LARSON, HARRY E.....		225
	Cross-examination.....	229
	Redirect Examination.....	235
	Recross-examination.....	235
McGEE, J. W.....		103
	Cross-examination.....	110
SMITH, CLIFFORD.....		61
	Cross-examination.....	64
VAN DORAN, J. L.....		131
	Cross-examination... ..	145
VON KESLER, J. R.....		296
	Cross-examination.....	305
TESTIMONY ON BEHALF OF DEFEND-		
ANTS:		
HILL, JOHN.....		478
	Cross-examination.....	480

	Index.	Page
TESTIMONY ON BEHALF OF DEFEND-		
ANTS—Continued:		
HORNE, WILLIAM.....		411
Cross-examination.....		415
KENNEDY, O. L.....		482
Cross-examination.....		484
KURTZ, F. A.....		314
Cross-examination.....		319
LOY, HANNIS.....		465
Cross-examination.....		474
Recalled.....		486
Cross-examination.....		487
PATTON, E. L.....		387
Recalled—Cross-examination... ..		431
Recalled.....		462
Recalled.....		489
Cross-examination.....		491
PICK, FRANK H.....		377
Cross-examination.....		382
Redirect Examination.....		385
Recross-examination.....		386
REID, WILBUR P.....		323
Cross-examination.....		343
Redirect Examination.....		373
Recalled.....		464
Recalled.....		481
REID, WILLIAM.....		456
SHARWICK, ALEC.....		451
VON ESCHEN, F.....		419
Cross-examination.....		424
Redirect Examination.....		430
Verdict.....		18
Writ of Error.....		3

Names and Addresses of Attorneys of Record.

J. F. BOOTHE, 1124 Board of Trade Building,
Portland, Oregon,

For the Plaintiffs in Error.

CAREY & KERR and OMAR C. SPENCER,
Yeon Building, Portland, Oregon,

For the Defendant in Error.

Citation on Writ of Error.

United States of America,

District of Oregon,—ss.

To H. A. Baker and to Carey & Kerr and Omar
C. Spencer, His Attorneys, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein William Reid and Wilbur P. Reid, partners doing business under the firm name and style of National Cold Storage & Ice Company, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 16th day of Nov., in the year of our Lord one thousand nine hundred and twenty-two.

R. S. BEAN,

Judge.

Service admitted Nov. 16, 1922.

OMAR C. SPENCER,

Attorneys for Plaintiff. [1*]

[Endorsed]: No. L.—8858. 3152. United States District Court, District of Oregon. H. A. Baker vs. William Reid et al. Citation on Writ of Error. Filed U. S. District Court, District of Oregon. Filed Nov. 17, 1922. G. H. Marsh, Clerk.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

WILLIAM REID and WILBUR P. REID,
Partners Doing Business Under the Firm Name
and Style of NATIONAL COLD STORAGE
& ICE COMPANY,

Plaintiffs in Error,

vs.

H. A. BAKER,

Defendant in Error.

*Page-number appearing at foot of page of original certified Transcript of Record.

Writ of Error.

The United States of America,—ss.

The President of the United States of America,
to the Judge of the District Court of the United
States for the District of Oregon, GREETING :

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable ROBERT S. BEAN, one of you, between H. A. Baker, plaintiff and defendant in error, and William Reid and Wilbur P. Reid, partners doing business under the firm name and style of National Cold Storage & Ice Company, are defendants and plaintiffs in error, and a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that

error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 17th day of November, 1922.

[Seal]

G. H. MARSH,
Clerk of the District Court of the United States
for the District of Oregon.

By F. L. Buck,
Chief Deputy. [2]

Service of the above writ of error made this 17th day of November, 1922, upon the District Court of the United States for the District of Oregon, by filing with me as said Clerk of the Court a duly certified copy of said writ of error.

G. H. MARSH,
Clerk of the District Court of the United States
for the District of Oregon.

By F. L. Buck,
Chief Deputy.

[Endorsed]: No. L-8858. In the U. S. Circuit Court of Appeals for the Ninth Circuit, William Reid et al., Plaintiffs in Error, vs. H. A. Baker, Defendant in Error. Writ of Error. Filed November 17th, 1922. G. H. Marsh, Clerk United States District Court District of Oregon. By F. L. Buck, Chief Deputy Clerk.

In the District Court of the United States for the
District of Oregon.

November Term, 1921.

BE IT REMEMBERED, That on the 23d day
of November, 1921, there was duly filed in the
District Court of the United States for the Dis-
trict of Oregon an amended complaint, in words
and figures as follows, to wit: [3]

In the District Court of the United States for the
District of Oregon.

No. —.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID,
Partners Doing Business Under the Firm
Name and Style of NATIONAL COLD
STORAGE & ICE COMPANY.

Defendants.

Amended Complaint.

Comes now the plaintiff and for cause of action
against the defendants alleges as follows:

I.

During all the times herein mentioned the plain-
tiff was and now is a citizen and resident of the
State of California.

II.

That during all of the times herein mentioned,

the defendants were and now are engaged as a copartnership under the firm name and style of National Cold Storage & Ice Company, and each of the defendants was and now is a citizen and resident of the State of Oregon.

III.

That this action involves an amount in excess of three thousand dollars (\$3,000.00) exclusive of costs and interest, as will more fully appear from this amended complaint.

IV.

That during the months of July and August, 1920, the plaintiff was the owner of 398 barrels, amounting to 170,156 pounds, of loganberries, and during said months said loganberries were delivered to and stored with the defendants at their cold-storage plant in the City of Portland, Oregon. That at the time said [4] loganberries were delivered the defendants accepted the same for storage and undertook and agreed to safely store and keep said loganberries in a proper state of refrigeration so that the same would not ferment or deteriorate in value, and would be liable for any loss or damage to said property except against the act of God, fire, rats, or other animals, insects, or the elements, and the plaintiff agreed to pay to the defendants for such storage certain agreed rates, but notwithstanding such undertaking and agreement by the defendants they wholly failed and neglected to keep said loganberries in a proper or in any state of refrigeration in this: That the temperature of the room or rooms where said loganberries were

stored was permitted by defendants to go above freezing point and was permitted to reach such a point that the said loganberries were caused to ferment, as a result of which they became worthless and their market value was thereby destroyed and said loganberries ever since and now are worthless and have no market value.

V.

That said loganberries when delivered to the defendants were in a proper condition, and the plaintiff has at all times paid all charges which have been demanded by the defendants, and has at all times performed all acts and things on his part to be done.

VI.

That the said frozen loganberries delivered to the defendants and stored by them in the months of July and August, 1920, were to be removed by plaintiff during the fall of 1920, during all of which time the market value of said loganberries had they been kept in such condition as to refrigeration as they were in when delivered to the defendants, was seventeen and one-half [5] cents per pound; but on account of the failure of the defendants to safely keep said loganberries in a proper state of refrigeration, and on account of the neglect of the defendants in failing to maintain said cold-storage plant or the room or rooms where said loganberries were stored in such condition that the temperature would not go above freezing point, the said loganberries after their receipt by defendants and during the fall of 1920,

were and now are worthless. That said loganberries were not removed by plaintiff in the fall of 1920, because their market value was destroyed by the defendants in the manner herein indicated.

VII.

That by reason of the premises the plaintiff has been damaged to the extent of the market value of said loganberries, or at the rate of seventeen and one-half cents per pound, or a total sum of twenty-nine thousand, seven hundred seventy-seven dollars and thirty cents (\$29,777.30.)

WHEREFORE, plaintiff prays judgment against the defendants for twenty-nine thousand seven hundred seventy-seven dollars and thirty cents (\$29,777.30), together with his costs and disbursements herein.

CAREY & KERR,
OMAR C. SPENCER,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, Omar C. Spencer, being first duly sworn depose and say that I am one of the attorneys for the plaintiff in the within action; that I have read the foregoing amended complaint, and the facts therein contained are true as I verily believe; that I [6] make this verification for the reason that the plaintiff is not now within the State of Oregon.

OMAR C. SPENCER.

Subscribed and sworn to before me this 23d day of November, 1921.

G. C. FRISBIE,
Notary Public for Oregon.

State of Oregon,
County of Multnomah,—ss.

Due service of the within amended complaint is hereby accepted in Multnomah County, Oregon, this 23d day of November, 1921, by receiving a copy thereof, duly certified to as such by Omar C. Spencer, of attorneys for plaintiff.

J. F. BOOTHE,
Attorney for Defendants.

Filed Nov. 23, 1921. G. H. Marsh, Clerk. [7]

AND AFTERWARDS, to wit, on the 29th day of November, 1921, there was duly filed in said court answer to amended complaint, in words and figures as follows, to wit: [8]

In the District Court of the United States for the
District of Oregon.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Part-
ners Doing Business Under the Firm Name
and Style of NATIONAL COLD STORAGE
& ICE COMPANY,

Defendants.

Answer to Amended Complaint.

The defendants answer the amended complaint of the plaintiff herein as follows:

I.

They admit Paragraphs I, II and III of the complaint.

II.

They deny each and every allegation contained in Paragraphs V, VI and VII of the complaint.

III.

Answering Paragraph IV of the complaint, the defendants say that during the months of July and August, 1920, the plaintiff delivered and stored with the defendants in their cold-storage plant, in the City of Portland, Oregon, 398 barrels of loganberries, amounting to approximately 170,156 pounds, which goods the defendants agreed to keep in refrigeration, at a price agreed upon to be paid by the plaintiff for said storage, and to use ordinary care such as prudent persons in the cold-storage business were accustomed to exercise toward such property, and to deliver the same to the plaintiff whenever requested so to do, subject to the act of God, fire, rats or other animals, insects or the elements. Save and except as herein stated, defendants deny each and every allegation contained in Paragraph IV of plaintiff's [9] amended complaint.

Further answering the amended complaint, the defendants allege:

I.

That the loganberries mentioned in the complaint were perishable goods and contained the natural inherent elements which would produce deterioration.

II.

That the 398 barrels of loganberries mentioned in the complaint were hauled a long distance in autotrucks during warm weather and were all warm and in bad condition when delivered to the defendants. That more than half were fermenting and sizzling and many barrels were bursting and blowing up.

III.

That upon receipt of said goods, the defendants placed them in their cold-storage plant and froze them and checked fermentation of those in bad condition, and thereafter kept them in refrigeration sufficient to preserve goods of that character if in good condition, except the natural decay inherent in the goods.

IV.

That the only time the plaintiff designated a temperature he desired was on or about the 13th day of August, when he requested a temperature of 24 degrees. That thereafter, the defendants maintained a temperature of 24 degrees in the room where said goods were stored.

V.

That said loganberries have ever since been and now are in as good condition as they were when placed in the cold-storage plant of the defendants,

except the natural decay or deterioration inherent in the goods themselves. [10]

VI.

That if said loganberries are in a damaged condition, such damages were caused by the negligence of the plaintiff in permitting them to ferment and become damaged prior to the time they were placed in the cold-storage plant of the defendants.

For a further and separate answer and by way of counterclaim against the plaintiff, the defendants allege:

I.

That during the years 1920 and 1921, the plaintiff stored with the defendants in their cold-storage plant in the City of Portland, Oregon, various and sundry barrels of loganberries, including the 398 barrels mentioned in the complaint herein, for which storage the plaintiff promised to pay the defendants at the rate of \$1.15 per barrel for the first month, and sixty-five cents per barrel per month thereafter.

II.

That an open and mutual account, therefore, existed between the defendants and the plaintiff. That the defendants rendered to the plaintiff an itemized statement of the storage accrued at the end of each and every month up to September 30, 1921, at which last date an account rendered to the plaintiff for said storage amounted to the sum of \$5,811.34, no part of which has been paid, and there is now due and owing from the plaintiff to the defendants the sum of \$5,811.34, with interest thereon from September 30, 1921.

III.

That said storage was payable monthly, and at the end of each and every month a demand therefor was made of the plaintiff; that the plaintiff received each and every statement above-mentioned and demand of payment; that the plaintiff has never made any objection to any of the said accounts so rendered. That [11] said sum of \$5,811.34 has become a stated account due from the plaintiff to the defendants.

WHEREFORE, defendants pray for judgment that the plaintiff take nothing by his complaint, but that the defendants recover from the plaintiff the sum of \$5,811.34, together with interest thereon from and after September 30, 1921, and for their costs and disbursements of this action.

J. F. BOOTHE,

Attorney for Defendants.

State of Oregon,

County of Multnomah,—ss.

I, Wilbur P. Reid, being first duly sworn, depose and say that I am one of the defendants in the above-entitled action; and that the foregoing answer is true as I verily believe.

[Seal]

WILBUR P. REID.

Subscribed and sworn to before me this 29th day of November, 1921.

J. F. BOOTHE,

Notary Public for the State of Oregon.

My commission expires Oct. 1, 1924.

State of Oregon,
County of Multnomah,—ss.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this 29th day of November, 1921, by receiving a copy thereof, duly certified to as such by J. F. Boothe, attorney for defendants.

OMAR C. SPENCER,
Of Attorneys for Plaintiff.

Filed Nov. 29, 1921. G. H. Marsh, Clerk. [12]

AND AFTERWARDS, to wit, on the 7th day of December, 1921, there was duly filed in said court, a reply in words and figures as follows, to wit: [13]

In the District Court of the United States for the District of Oregon.

No. —.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Partners Doing Business Under the Firm Name and Style of NATIONAL COLD STORAGE AND ICE COMPANY,

Defendants.

Reply.

Comes now the plaintiff and for reply to the affirmative matter contained in the first further and separate answer and defense, admits, denies and alleges as follows:

I.

Plaintiff admits that the loganberries mentioned in the complaint were perishable provided they were not kept in a proper state of refrigeration by the defendants, and except as above admitted he denies each and every allegation contained in paragraph I of said answer.

II.

Plaintiff admits that the said loganberries were delivered to the cold-storage plant of the defendants by autotruck during the summer of 1920, but except as above admitted, plaintiff denies each and every allegation contained in paragraph II of said answer.

III.

Plaintiff admits that upon the receipt of said loganberries defendants placed them in their cold-storage plant, but except as above admitted, he denies each and every other allegation contained in paragraph III of said answer.

IV.

Plaintiff denies each and every allegation of [14] paragraphs IV, V and VI of said answer.

Further replying to the second further and separate answer set up by way of counterclaim, plaintiff admits, denies and alleges as follows:

I.

Plaintiff admits that during the year 1920, certain barrels of loganberries were stored with the defendants at their cold-storage plant, and in consideration of the defendants' agreement to keep said loganberries in a proper state of refrigeration, plaintiff agreed to pay certain storage charges, but except as above admitted, plaintiff denies each and every allegation contained in paragraph I of said second further and separate answer.

II.

Plaintiff admits that he has not paid any part of the sum of \$5,811.34 to the defendants, but except as above admitted, he denies each and every allegation contained in paragraph II of said second further and separate answer.

III.

Plaintiff denies each and every allegation contained in paragraph III of said second further and separate answer.

WHEREFORE, plaintiff prays for judgment as in his complaint demanded.

CAREY & KERR,
OMAR C. SPENCER,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, Omar C. Spencer, being first duly sworn depose [15] and say that I am one of the attorneys for the within named plaintiff; that I have read the foregoing reply, and the same is true, as I verily believe; that I make this verification for the reason

that the plaintiff is not now within the county of Multnomah, State of Oregon.

OMAR C. SPENCER.

Subscribed and sworn to before me, this 7th day of December, 1921.

[Seal]

G. C. FRISBIE,
Notary Public for Oregon.

State of Oregon,
County of Multnomah,—ss.

Due service of the within reply is hereby accepted in Multnomah County, Oregon, this — day of December, 1921, by receiving a copy thereof, duly certified to as such by Omar C. Spencer, of attorneys for plaintiff.

J. F. BOOTHE,
Attorney for Defendant.

Filed Dec. 7, 1921. G. H. Marsh, Clerk. [16]

AND AFTERWARDS, to wit, on the 15th day of June, 1922, there was duly filed in said court a verdict, in words and figures as follows, to wit:
[17]

In the District Court of the United States for the District of Oregon.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Partners Doing Business Under the Firm Name and Style of NATIONAL COLD STORAGE & ICE COMPANY,

Defendants.

Verdict.

We, the jury duly impaneled in the foregoing cause to try the same, find a verdict in favor of plaintiff and against the defendants and assess the damage of plaintiff in the sum of twenty-three thousand dollars (\$23,000.00), with storage charges paid.

FRANK E. HILTON,
Foreman.

Filed June 15, 1922. G. H. Marsh, Clerk. [18]

AND AFTERWARDS, to wit, on Thursday, the 15th day of June, 1922, the same being the 87th judicial day of the regular March term, of said Court—Present the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [19]

In the District Court of the United States for the District of Oregon.

No. L—8858.

June 15, 1922.

H. A. BAKER

vs.

WILLIAM REID et al.

Minutes of Court—June 15, 1922—Judgment.

Now at this day come the parties hereto by their counsel as of yesterday, whereupon the jury impaneled herein being present and answering to their names, the trial of this cause is resumed. Whereupon on motion of defendants for a directed verdict in their favor herein,—

IT IS ORDERED that said motion be and the same is hereby denied, and that said defendants be and they are hereby allowed an exception to said ruling.

And said jury having heard the evidence adduced, the arguments of counsel and the charge of the Court, retire in charge of proper sworn officers to consider of their verdict. And thereafter said jury returns to the Court the following verdict, viz.:

“We, the Jury duly impaneled in the foregoing cause to try the same, find a verdict in favor of plaintiff and against the defendants and assess the damage of plaintiff in the sum of Twenty-three Thousand Dollars (\$23,000.00) with storage charges paid.

FRANK E. HILTON,
Foreman.”

—which verdict is received by the Court and ordered to be filed. Whereupon

IT IS ADJUDGED that said plaintiff do have and recover of and from said defendants the sum of \$23,000.00, and its costs and disbursements herein taxed in the sum of \$319.66 and that said plaintiff have execution therefor. [20]

AND AFTERWARDS, to wit, on the 16th day of November, 1922, there was duly filed in said Court, a petition for writ of error, in words and figures as follows, to wit: [21]

In the District Court of the United States for the District of Oregon.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Partners Doing Business Under the Firm Name and Style of NATIONAL COLD STORAGE & ICE COMPANY,

Defendants.

Petition for Writ of Error.

William Reid and Wilbur P. Reid, the defendants in the above-entitled action, conceiving themselves aggrieved by the final order and judgment of this Court made and entered against them and in favor of the plaintiff on the 15th day of June, 1922, and the verdict and judgment of the jury in said cause made and the objections severally taken thereto and the rulings of the Court thereon, as set forth in their assignments of error filed herein, petition said Court for an order allowing said defendants to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignments of error filed herewith under and in accordance with

the rules of the United States Circuit Court of Appeals in the behalf made and provided.

And also that an order be made fixing the amount of security which the defendants shall give and furnish in said writ of error, and that upon giving such security all other proceedings in the Court be suspended and stayed until the dismissal of said writ of error by the United States Circuit Court of Appeals, and relative thereto the defendants respectfully show:

That by reason of the premises the defendants allege [22] manifest error has happened, to the great damage of the defendants herein.

The defendants have filed herewith their assignments of error upon which they rely and will urge in the said United States Circuit Court of Appeals.

WHEREFORE, the defendants pray that a writ of error may issue out of the United States Circuit Court of Appeals for the Ninth Circuit to this Court for the correction of the errors so complained of, and that a transcript of the record of proceedings, papers and all things concerning the same, upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, to the end that said judgment be reversed and that the defendants recover judgment as demanded in their answer.

J. F. BOOTHE,
Attorney for the Defendants.

State of Oregon,
County of Multnomah,—ss.

Due service of the within petition is hereby accepted in Multnomah County, Oregon, this 8th day of November, 1922, by receiving a copy thereof, duly certified to as such by J. F. Boothe, attorney for defendants.

OMAR C. SPENCER,
Attorney for Plaintiff.

Filed Nov. 16, 1922. G. H. Marsh, Clerk. [23]

AND AFTERWARDS, to wit, on the 16th day of November, 1922, there was duly filed in said court, an assignment of errors, in words and figures as follows, to wit: [24]

In the District Court of the United States for the
District of Oregon.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Part-
ners Doing Business Under the Firm Name
and Style of NATIONAL COLD STORAGE
& ICE COMPANY,

Defendants.

Assignments of Error.

Come now the above-named defendants appear-

ing by J. F. Boothe, their attorney of record, and say that the judgment and final order of this Court made and entered in the above-entitled court on the 15th day of June, 1922, in favor of the plaintiff above named and against the defendants above named is erroneous and against the just rights of the defendants, and file herein, together with their petition for writ of error from said judgment and order, the following assignments of error, which they aver occurred upon the trial of said cause:

(1) The Court erred in admitting evidence over the objections and exceptions of the defendants to the shipping of two or more carloads of loganberries from the defendants' cold-storage plant in Portland, Oregon, to Chicago, Illinois, on and after the 4th of August, 1920, and to the testimony brought out before the jury concerning the condition of the loganberries so shipped on their arrival in Chicago.

(2) The Court erred in refusing, over the exception of the defendants, to direct the jury to bring in a verdict in favor of the defendants.

(3) The Court erred in overruling defendants' objections [25] generally to a judgment in favor of the plaintiff for any sum of money and in not entering judgment as requested in their favor for the reason that the testimony properly supports a judgment in favor of the defendants.

(4) The Court erred in failing to enter a judgment for the defendants as requested and in not

giving judgment in favor of the defendants for the dismissal of the plaintiff's complaint.

WHEREFORE, the said defendants and plaintiffs in error pray that said judgment of the District Court be reversed, with directions to the District Court to enter judgment in favor of the defendants.

J. F. BOOTHE,
Attorney for Defendants.

State of Oregon,
County of Multnomah,—ss.

Due service of the within assignments of error is hereby accepted in Multnomah County, Oregon, this 8th day of November, 1922, by receiving a copy thereof, duly certified to as such by J. F. Boothe, attorney for defendants.

OMAR C. SPENCER,
Of Attorneys for Plaintiff.

Filed Nov. 16, 1922. G. H. Marsh, Clerk. [26]

AND AFTERWARDS, to wit, on the 16th day of November, 1922, there was duly filed in said court, a supersedeas bond, in words and figures as follows, to wit: [27]

In the District Court of the United States for the
District of Oregon.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Part-
ners Doing Business Under the Firm Name
and Style of NATIONAL COLD STORAGE
& ICE COMPANY,

Defendants.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS,
that William Reid and Wilbur P. Reid, partners
doing business under the firm name and style of
National Cold Storage & Ice Company, as principal,
and Etta Reid and Alfred J. Bingham, as sureties,
are held and firmly bound unto H. A. Baker, in
the sum of Twenty-five Thousand Dollars (\$25,-
000.00), to be paid to said H. A. Baker, for the pay-
ment of which well and truly to be made, we bind our-
selves, our successors, executors and assigns, jointly
and severally, by these presents.

Sealed with our seals and dated this 15th day of
November, 1922.

Whereas, the above-named William Reid and
Wilbur P. Reid, partners doing business under the
firm name and style of National Cold Storage &
Ice Company, have applied for and obtained a
writ of error to the United States Circuit Court
of Appeals for the Ninth Judicial Circuit, to re-

verse the judgment rendered in the above-entitled cause by the District Court of the United States, for the District of Oregon.

NOW, THEREFORE, the condition of this obligation is such that if the said William Reid and Wilbur P. Reid, partners doing business under the firm name and style of National Cold Storage & Ice Company, shall prosecute said writ to effect and answer all damages and costs, if they shall fail to make good their plea, [28] then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

WILLIAM REID.

WILBUR P. REID.

ETTA REID.

ALFRED J. BINGHAM.

State of Oregon,

County of Multnomah,—ss.

We, Etta Reid and Alfred J. Bingham, whose names are subscribed to the within undertaking as sureties, being severally duly sworn, each for himself says: That I am a resident and freeholder within the State of Oregon and am not a counselor or attorney at law, sheriff, clerk or other officer of any court, and am worth the sum of Fifty Thousand Dollars (\$50,000) over and above all debts and liabilities and exclusive of property exempt from execution.

ETTA REID.

ALFRED J. BINGHAM.

Subscribed and sworn to before me this 15th day of November, 1922.

[Seal]

J. F. BOOTHE,

Notary Public for Oregon.

My commission expires Oct. 1, 1924.

Filed Nov. 16, 1922. G. H. Marsh, Clerk.

Approved Nov. 16, 1922.

R. S. BEAN,

Judge. [29]

AND AFTERWARDS, to wit, on the 16th day of November, 1922, there was filed in said court a praecipe for transcript, in words and figures as follows, to wit: [30]

In the District Court of the United States for the District of Oregon.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Partners Doing Business Under the Firm Name and Style of NATIONAL COLD STORAGE & ICE COMPANY,

Defendants.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the complete record in the above-entitled cause, to be filed in the office of the Clerk of the United States Cir-

cuit Court of Appeals, for the Ninth Circuit, under the writ of error to be perfected herein, and include in said transcript the following proceedings, papers, records and files, to wit:

(1) Plaintiff's amended complaint; (2) defendants' answer; (3) plaintiff's reply; (4) judgment; (5) bill of exceptions; (6) exhibits, and testimony; (7) petition for writ of error; (8) assignments of error; (9) order allowing writ of error and fixing bond; (10) writ of error; (11) citation, on writ of error, and all other records, entries, orders, papers and files necessary and proper to make a complete record from said writ of error in said cause; said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals, for the Ninth Circuit.

J. F. BOOTHE,

Attorney for the Defendant.

Filed Nov. 16, 1922. G. H. Marsh, Clerk. [31]

AND AFTERWARDS, to wit, on the 17th day of November, 1922, there was duly filed in said court a bill of exceptions, in words and figures as follows, to wit: [32]

In the District Court of the United States for the
District of Oregon.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR P. REID, Part-
ners Doing Business Under the Firm Name
and Style of NATIONAL COLD STORAGE
& ICE COMPANY,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED that on the 12th day of June, 1922, at Portland, Oregon, the above-entitled action came on for trial before the Honorable Robert S. Bean, District Judge, and a jury, the plaintiff appearing by Carey & Kerr and Omar C. Spencer as his attorneys, and the defendants appearing by J. F. Boothe as their attorney, whereupon the following proceedings were had:

It appears from the evidence that during the months of July and August, 1920, the plaintiff deposited with the defendants in their cold-storage plant at Portland, Oregon, about 1,720 barrels of loganberries, which the defendants, for a certain consideration, agreed to keep under refrigeration, to be delivered to the plaintiff or shipped out under his orders.

Plaintiff offered evidence tending to show that prior to August 1, 1920, two of said barrels, and after August 1, 1920, the remaining of said barrels were

shipped to various points to the plaintiff, or under the direction of the plaintiff, except the 398 barrels which were still on hand in said cold-storage plant at the time this action was commenced. Plaintiff also offered evidence tending to show that from and after August 1, 1920, the temperature of the room where said berries were stored was permitted by said defendants to go above freezing, resulting in fermentation and that the market value of said 398 barrels had been destroyed.

At the trial of this cause, the plaintiff introduced [33] as evidence by deposition, the testimony of Matthew H. Theis and Peter J. Slaughter of Chicago, and the plaintiff was a witness in his own behalf, all of which witnesses testified concerning the condition of the loganberries in Chicago, Illinois, which were so shipped from said cold-storage plant by the plaintiff to customers of the plaintiff at Chicago, Illinois.

In support of the plaintiff's case and in order to show the damaged condition of the 398 barrels of loganberries, the subject of this action, the plaintiff, H. A. Baker, was called as a witness and was asked the following question: "Now, what did you do toward attempting to save the product after this fermentation had been evident in it? What I mean is, did you sell it or undertake to sell it?" To which the witness answered: "Why, we had them in transit five or six cars, I think four or five cars—five cars, we will say, that had been shipped out between the first of August, and when the difficulty arose, we will say the sixteenth of August. One of the cars that were shipped into Chicago—"

At this point of the testimony the defendants, by their attorney, stated: "Your Honor, I object to that, to this answer, and move to have it stricken out. That has nothing to do with these barrels that are in question. What he had shipped to Chicago had nothing to do with this, these particular goods we are dealing with, these 398 barrels that he says were in cold storage at that time."

Counsel for the plaintiff then stated: The fact of the matter is, your Honor, it is our position in this case that the same treatment was given to all of the barrels as to those that were shipped out prior to about the first of August. I think there were about two cars which went out prior to the first of August. It was after the first of August that the temperature went up to thirty-six degrees and stayed there some time, and it is our notion [34] about it that the same thing happened, substantially, to all of those barrels of berries that were subject to that rise in temperature. My idea about it is that berries that were subject to that that went East and arrived in bad order are in just the same shape as these are here now in bad order."

The COURT.—"You are not claiming—"

Mr. SPENCER.—"We are not claiming any damages for those that went East."

The COURT.—"They were in there at the same time. He may answer."

Mr. SPENCER.—"We are not claiming any damages to those that went East at all, because they were sold to other people."

Mr. BOOTHE.—“Note an exception.”

The witness then answered: “The car that was shipped to Chicago to one of our buyers about the fourth of August arrived there with about twenty-nine barrels in bad order; it was so reported. Another car that was shipped, I think about four or five days later than that, arrived there with about between fifty and sixty per cent; I understand there was about one hundred barrels to a car, ran from ninety-nine to one hundred and five, and the second there was about fifty to sixty per cent that arrived in bad condition. The third car, which went out a few days later than that, probably three or four days, perhaps only two or three days, that time, arrived all in bad condition, and all that were shipped arrived after that—between that time and when I stopped them, when I found out the actual condition—arrived in bad order excepting those two cars I have just mentioned, when a portion of that was saved, showing the progress of the fermentation.

Question. “You shipped, as I understand your earlier statement, two cars prior to August first?”
[35]

Answer. “Two cars were shipped to St. Louis, containing one hundred and five barrels each, which arrived in good condition.”

Question. “No claim was made against you or anybody else as to that?”

Answer. “No, sir.”

Question. “But as to the barrels that were in there on August first and were shipped out after

that date, or were put in after that date and subsequently shipped out, what is the fact as to whether or not claims have been made against you on account of the fermented condition—bad condition?"

Mr. BOOTHE.—“I object to that, your Honor. Those goods were shipped a long ways in refrigerator-cars, probably three or four weeks reaching their destination.”

The COURT.—“I think it is a circumstance; whatever the jury thinks it is worth, of course.”

Answer. “Why, most of them arrived in bad condition, excepting these I have just mentioned, the two cars.”

To all of which testimony the defendants by their attorney objected, and excepted to the rulings of the Court in permitting the same to be given, and an exception was allowed.

At the conclusion of the testimony the defendants, by their attorney, requested the Court to instruct the jury to bring in a verdict in favor of the defendants for the following reasons: The testimony in this cause shows that many of the barrels of loganberries were in a fermenting and damaged condition at the time they were placed in the cold-storage plant of the defendants. That the burden of proof is always on the plaintiff to show negligence on the part of the defendants which caused damage to the goods, if any. That the defendants, having overcome by their evidence any presumption of negligence on their part and having produced testimony [36] to the effect that the said 398 barrels of loganberries were in a damaged condition

when placed in the cold-storage plant of the defendants, it became necessary for the plaintiff to then go forward with the evidence and still maintain the burden of proof in order to charge the defendants with negligence. That if the said loganberries were delivered to the defendants in a damaged condition and were still further damaged by the acts of the defendants it was the duty of the plaintiff to show the value of the goods when placed in cold-storage and the value of the goods after they were further damaged by the acts of the defendants. That no such proof having been offered by the plaintiff, the defendants were entitled to a directed verdict in their favor, which the Court refused. To the refusal of the Court in so directing the jury, the defendants by their counsel duly excepted and an exception was allowed.

And now, because the foregoing matters and things are not of record in this cause, I, Robert S. Bean, Judge of the District Court of the United States, for the District of Oregon, do hereby certify that the foregoing bill of exceptions truly states proceedings had before me and the jury on the trial of the above-entitled action, and contains, together with the evidence herewith certified by the Clerk of the Court, all the evidence, both oral and written, introduced by either of said parties throughout said trial, together with the rulings of the Court on the questions of law presented and that exceptions taken by the defendants therein were duly prepared and submitted within the time allowed by the rules of this Court as extended by

stipulation of the parties and the order of this Court duly made and entered in accordance with the provisions of such stipulations, and is now signed and settled as and for the bill of [37] exceptions in the above-entitled action, and the same is ordered and made a part of the record in said action. All the testimony and exhibits in this cause shall be deemed a part of this bill of exceptions.

Dated Nov. 16, 1922.

R. S. BEAN,
Judge.

O. K.—OMAR C. SPENCER.

State of Oregon,
County of Multnomah,—ss.

Due service of the within bill of exceptions is hereby accepted in Multnomah County, Oregon, this 8th day of November, 1922, by receiving a copy thereof, duly certified to as such by J. F. Boothe, attorney for defendants.

OMAR C. SPENCER,
Of Attorneys for Plaintiff.

Filed Nov. 17, 1922. G. H. Marsh, Clerk. [38]

In the District Court of the United States for the
District of Oregon.

H. A. BAKER,

Plaintiff,

vs.

WILLIAM REID and WILBUR REID, Partners
Doing Business Under the Firm Name and
Style of NATIONAL COLD STORAGE &
ICE COMPANY,

Defendants.

BE IT REMEMBERED, That this cause came on to be heard before the Honorable Robert S. Bean, Judge of the above-entitled court, and a jury duly empaneled to try same, on Monday, June 12, 1922, at the hour of 2:00 o'clock P. M. of said day; the plaintiff appearing by Mr. Omar C. Spencer, his attorney, and the defendants appearing by Mr. J. F. Boothe, their attorney.

WHEREUPON, the jury having been duly accepted and the opening statements made by counsel for the respective parties, the following proceedings were had:

Testimony of L. H. Huntley, for Plaintiff.

L. H. HUNTLEY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Mr. SPENCER.—I will say, your Honor, I am calling this witness a little out of order; he wants to get away and he is the man who made an examination of the contents of this barrel.

Q. Your name is L. H. Huntley?

A. Yes, sir.

Q. What is your profession? A. Chemist.

Q. A chemist? A. Yes, sir.

Q. What experience have you had as a chemist?

A. About thirteen years. [39]

Q. Are you a graduate of any school of chemistry?

A. Northwestern University, yes, sir.

(Testimony of L. H. Huntley.)

Q. And you have been engaged as chemist for about fifteen years? A. Yes, sir.

Q. Whereabouts?

A. Back east and Chicago and in Portland.

Q. How long have you been located in Portland?

A. Oh, since 1909, with the exception of three years when I was back east.

Q. Do you maintain laboratories here?

A. I do.

Q. Under what name?

A. It is the Howe and Huntley laboratories, at 606 Medical Building.

Q. How long have you maintained those laboratories? A. Three years.

Q. What is the character of your work as a chemist? A. General chemistry.

Q. Do you have occasion to be employed by the City and State at times?

A. Occasionally, yes, sir.

Q. Mr. Huntley, did you have occasion to go with one Mr. Baker to the cold-storage plant of the Reids, the National Cold-Storage and Ice Company, to examine or take samples from barrels of loganberries? A. I did.

Q. When was that?

A. That was in October, 1921.

Q. And you went there at the request of Mr. Baker, the plaintiff in this case? A. I did.

Q. And what did you do when you got there?

A. Took samples from several barrels of berries.

(Testimony of L. H. Huntley.)

Q. Just describe, will you please, how you took those samples, from what barrels or how many?
[40]

A. We took samples from several barrels. Some barrels we broke open and took specimens and some we took specimens from that were already broken open.

Q. In taking off samples, what was your object, as to the barrels?

A. To get a fair and general sample of the whole lot.

Q. Then what did you do with those samples you took? A. I examined them.

Q. You took them back with you to your laboratory? A. Yes, sir.

Q. Did you make a test of the contents of these barrels of loganberries? A. I did.

Q. You say Mr. Baker was with you at the time?
A. Yes, sir.

Q. And were those pointed out as the barrels of loganberries that he had originally placed there with the cold-storage people? A. They were.

Q. Now, will you just please explain what you found from your chemical analysis of the contents of those barrels?

A. Upon examination of the berries I found that there had been fermentation and that you cannot have fermentation unless you have a production of alcohol and carbonic acid gas, and during the process of the fermentation the carbonic acid gas swells up and usually blows the container, the same

(Testimony of L. H. Huntley.)

as it does in home brew. In a good many cases you put the cork in and fermentation goes on, it either breaks the bottle or blows the cork. Same with these berries, something breaks and usually it is the barrel.

Q. In all the samples you took there, will you say whether or not you did find alcohol and carbonic acid gas in all of them?

A. I found alcohol, and if you have alcohol you must have carbonic [41] acid gas, naturally.

Q. Did you find any acetic acid?

A. I did, above the normal.

Q. Can you explain to the jury just how you made these tests, so they will get some more—

A. I usually make those tests in comparison; that is, I took these particular berries and loganberry juice, fresh juice which I bought on the market, and then I purchased some of the dried loganberries, as it was not possible at that time to get the fresh berries. These three ingredients, or these three berries, I subjected to the same process. The fresh berry juice which I got showed complete fermentation, that is to say, the juice completely fermented. The berry juice which I extracted from the dried berries showed the same condition. The juice which I took from the berries in the warehouse showed only a very partial fermentation, showing that fermentation had actually been in process and was practically complete at the time I took the sample.

Q. In discussing fermentation, is there such a

(Testimony of L. H. Huntley.)

thing as partial fermentation or complete fermentation, and how do you refer to that?

A. Well, in speaking of fermentation it is understood you can only actually ferment about eighty per cent of the sugar present. The other twenty per cent is a rather nonfermentative type and about eighty per cent is all you can possibly ferment.

Q. Well, when loganberries are fermented is there any partial stage about it or is it a complete stage of fermentation?

A. Well, usually goes on to a finish, once it is started.

Q. These berries you analyzed there, had they gone on to the finish, or had they just started?

A. I think they had finished.

Q. And can you say what percentage of alcohol you found in those berries? [42]

A. Approximately three per cent.

Q. Three per cent? A. Yes, sir.

Q. Now, from your analysis and from your knowledge as a chemist, what would that indicate as to the food value, particularly with reference to the sugar present in the berries?

A. The sugar content of the berries show around from six to ten per cent, and if you find three per cent of alcohol that means you must have fermented six per cent of sugar, because your alcohol is made of sugar, half and half; half of your sugar goes to alcohol and half of your sugar goes to carbonic acid gas. To use six per cent of sugar you have three

(Testimony of L. H. Huntley.)

per cent of alcohol and if you ferment six per cent of sugar out of your berries there is not going to be very much left.

Q. From your examination of these berries and from what you found in them, would you say their value as food had been destroyed, or not?

A. I would.

Mr. SPENCER.—Cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

You said it was October 21st when you went there for some of these berries?

A. I said in October; I think it was the 29th.

Q. Twenty-ninth? A. Yes, sir.

Q. Who went with you? A. Mr. Baker.

Q. Who did you see over there at the plant, if anybody, that let you in to look at the berries?

[43]

A. That was through the auspices of Mr. Baker; I don't remember the gentleman who introduced us.

Q. Some attendant there take you down?

A. With Mr. Baker; yes, sir.

Q. What kind of looking man was he?

A. That is quite a while ago; I could not tell you.

Q. This man here?

A. I don't know, I am sure.

Q. How many barrels did you examine?

A. Probably eight or ten.

Q. Where were they located; what part of the plant? A. In the basement.

Q. In what part of the basement?

(Testimony of L. H. Huntley.)

A. Well, sir, I could not tell you in what part of the basement. I know we went down an elevator into the basement and there the barrels were piled, I should judge in the northeast corner of the basement, if my sense of direction is correct.

Q. How did you get into the barrels?

A. We broke them open.

Q. Were any of the heads burst that you opened up? A. I beg your pardon?

Q. Were any of the heads burst that you opened up?

A. Well, some of them we didn't have to open up, some of them were already bursted wide open.

Q. You examined those that were already open, too, did you? A. Yes, sir.

Q. How many did you examine that you opened?

A. That we broke open?

Q. That you broke open.

A. As I say, we took specimens from probably eight or ten barrels, making an average of the eight or ten; that is, we took a portion of each one of eight or ten barrels, some that were opened, some not opened. [44]

Q. From your examination of those barrels you found there, did you say that those whole 398 barrels of loganberries were ruined?

A. I would say so; yes, sir.

Q. You don't know anything about any of them except those few you opened?

A. I should judge that would be sufficient, just the same as examining all of them.

(Testimony of L. H. Huntley.)

Q. Are you going to lump the whole 398 because you examined eight or ten barrels?

A. Because I examined the eight or ten barrels I would say they were all alike.

Q. You say that the whole of the 398 were destroyed for food?

A. As I say, I didn't analyze each individual barrel, because that would be an endless task. Whenever we do anything of that kind we take an average of the whole and make an analysis of it and as a rule that passes.

Q. Did you tell Mr. Reid or anybody in connection with the plant there you were going to examine those goods? A. I did not.

Q. Why didn't you tell Mr. Reid?

A. I was hired by Mr. Baker.

Q. So you and Mr. Baker went around in there and got into the basement and got some samples and made your examination without telling Mr. Reid anything about it?

A. That was through the auspices of Mr. Baker. Mr. Baker did the arranging; I had nothing to do with it.

Q. Do you not know as a fact that if you take those very same samples you examined and put some sugar in them they are substantially as good as they ever were?

A. No, sir; they would not be. [45]

Q. You are positive of that, are you?

A. Yes, sir.

Q. Did you ever see that done?

(Testimony of L. H. Huntley.)

A. I would not want to eat them.

Q. I was asking you if you ever saw that done?

A. No, sir, I never have.

Q. You know it is done, do you not?

A. No, sir, I do not.

Q. The fact that you found some alcohol in there did not cause you to condemn the goods, did it?

A. Cannot have alcohol unless we have fermentation.

Q. Well, it is natural to have alcohol in berries, isn't it?

A. No, sir; it is not without fermentation.

Q. Don't all kinds of berries, when they ferment, create alcohol?

A. Fresh fruit doesn't have alcohol.

Q. I know; but you take fresh fruit, fresh berries, when they ferment don't they produce alcohol?

A. Anything that is fermented produces alcohol; yes, sir.

Q. When you put the sugar back, doesn't that put them back where they were?

A. No, sir; you still have your alcohol present.

Q. It practically recuperates them, does it not?

A. I would say not; no, sir.

Q. What was the object of putting these berries in cold storage? A. I suppose to keep them.

Q. Keep them what? A. Keep them fresh.

Q. Will that keep them fresh, putting them in cold storage?

A. That is what they are put there for.

Q. Those berries have within themselves, there,

(Testimony of L. H. Huntley.)

natural inherent qualities which will destroy them, have they not? [46] A. I beg your pardon, sir.

Q. Those berries have within themselves, there, natural inherent qualities which will destroy them, have they not? A. All fruit has that.

Q. All fruit has them? A. Yes.

Q. They are all perishable? A. Yes.

Q. And merely freezing them holds them where they were; isn't that the idea?

A. That is my understanding.

Q. Then if those berries when they were put into that cold-storage plant were in a fermenting condition what would the freezing do to them?

A. I don't know as it would do anything to them.

Q. Would it help them any?

A. It might check their fermentation.

Q. Suppose, then, Mr. Huntley, if those goods when they were put in that warehouse were in a fermenting condition, some of the barrels bursting, and they were frozen, would that have a tendency to retain them in the same condition that they were put in there?

A. Well, it takes a very cold temperature to stop fermentation.

Q. How cool?

A. Well, you have to have practically ice before you prevent fermentation.

Q. How cool have you got to put them down to stop fermentation?

A. Well, as to that, I don't know how cold it has to be. It has to be frozen practically solid.

(Testimony of L. H. Huntley.)

Q. Then if they went in there in a fermenting condition it would be almost impossible to preserve them by freezing?

A. It would depend on your temperature. [47]

Q. How cool do you say they ought to be?

A. Well, around twenty-two or twenty-three, around there, you would perhaps check that fermentation.

Q. That would freeze them into ice?

A. That would practically stop fermentation at that time.

Q. That just holds them as they were?

A. Yes, sir.

Q. Now, then, if those berries were put in there in July and August and frozen and held in that frozen condition until October 29th, when you examined them, and found them bad, that condition related back to the time they were put into the cold storage, would it not?

A. I would not hardly think so.

Q. Well, if they were damaged when they were put into the cold-storage and frozen and kept there until the 29th, then you found them in the same damaged condition they were in when they were put in there, wouldn't you?

A. I didn't see them when they were put in there; I don't know anything about that; that was two years ago.

Q. I think you could answer that question, couldn't you, whether you saw them or not?

A. Yes, sir.

(Testimony of L. H. Huntley.)

Q. I will state it again; maybe I don't make myself clear. If the goods were put in there in the middle of July, first of August, were in a fermenting condition—I will use the word fermenting instead of damaged— A. Yes, sir.

Q. If they were in a fermenting condition—

A. Yes, sir.

Q. And were immediately frozen, say twenty-four to twenty-six degrees, along there somewhere, immediately frozen and kept in that condition until the 29th of October or about that time, when you [48] examined them, then they have been held from the August condition until the 29th of October by the freezing process, haven't they?

A. There should not be very much increase in fermentation during that time, no, if they were kept that cold.

Q. Then, if they were damaged, worthless as fruit, when you found them, the damage had occurred by the fact of their having fermented before they were put into the freezer, isn't that right?

A. That I don't know.

Q. Well, that would be right if they were in a fermenting condition when put into the freezer?

A. If they were in a fermented condition—fermented condition, let me tell you, a fermented condition does not take place in a few hours, it takes several days for fermentation. No fermentation under the condition considered, you see, will take place in twenty-four hours. It takes several days for that, say seventy-two hours.

(Testimony of L. H. Huntley.)

Q. How long will it take berries to ferment if pounded down in a barrel?

A. About three days.

Q. Don't they begin to ferment at once as soon as they are mashed? A. No, they don't.

Q. You are a chemist? A. I am.

Q. And say that they don't begin to ferment at once when you mash them up?

A. Absolutely. I spent three years in fermentation experiments.

Mr. BOOTHE.—That is all.

Redirect Examination.

Q. Mr. Huntley, counsel asked you why, if these berries were fermented, you could not put sugar in them and bring them right back again to the same stage.

A. It is a different kind of sugar, Mr. Spencer.
[49]

Q. Well, from the standpoint of food value, what happens when fermentation takes place; does anything happen to the cells of the berry?

A. Yes, you have nothing left but pulp; when your fermentation is complete you have only the shell of the berry. Sometimes it retains its original shape and sometimes it is broken to pieces.

Q. And is there any such thing as restoring, unscrambling or unfermenting a lot of berries after they have been fermented, by simply putting sugar in them? A. No, sir; you can't do that.

Q. Now, counsel asked you about supposing that these berries were fermented when they went in

(Testimony of L. H. Huntley.)

there and were then frozen and remained frozen for about a year and you went and examined them, whether or not the condition you found might not have been the result of the conditions they were in. Let me put this supposition to you: Suppose that the berries went in all right— A. Yes, sir.

Q. And along in the middle of August the temperature was allowed to go to thirty-six degrees and stayed there for four or five days, what would happen to the berries?

A. Very likely they would ferment; that would be the natural condition.

Mr. SPENCER.—That is all.

Recross-examination.

Q. Now, then, let's go back again, Mr. Huntley.

A. Yes, sir.

Q. Suppose that when they were put in there they were in a fermenting condition.

A. Yes, sir.

Q. And they were frozen and then a little later the temperature went up and they fermented again, which fermentation caused the [50] damage, the first or the second?

A. Well, when you have the beginning of fermentation you must have an increase in yeast plants and if you stop that fermentation soon after it has begun you have a small quantity or small number of yeast plants frozen; then if your temperature goes up you have a greater number of yeast plants to start in to work than you had in the original beginning, therefore, your fermentation will

(Testimony of L. H. Huntley.)

be faster in the second stage of the game than it would be in the first stage of the game.

Q. When those berries are put into barrels and mashed in the cells are all broken, or practically all broken, are they not?

A. Not necessarily, but if you smash a berry usually you break the cell structure of the berry.

Q. You have pulp then, do you not?

A. It is not necessary to have pulp for fermentation.

Q. Is that the proper way to pack berries? Do you know anything about packing berries?

A. I don't know anything about packing berries.

Q. You don't know anything about that?

A. No, sir, I do not.

Mr. BOOTHE.—That is all.

Witness excused. [51]

Testimony of G. M. Huffman, for Plaintiff.

G. M. HUFFMAN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Where do you live, Mr. Huffman?

A. Six miles south of Salem.

Q. What is your occupation or business?

A. Raising berries; berry yard.

Q. You have a loganberry yard? A. Yes, sir.

Q. And about how large is that?

A. At the present time about four acres.

(Testimony of G. M. Huffman.)

Q. You had a yard in 1920? A. Yes, sir.

Q. How large a yard?

A. Six acres; I had one patch rented.

Q. You had one patch rented then?

A. Yes, two acres.

Q. During the season of 1920 did you sell logan-berries to Mr. H. A. Baker? A. Yes, sir.

Q. Now, will you describe just how the berries are picked, getting them ready for accumulation at the packing plant of Baker, that season?

A. Well, in the first place the pickers have a little box that holds eight pounds—eight boxes, rather. They pick in that and then the grower checks them off when they get that full and carry these to the berry-shed.

Q. To the berry-shed?

A. Yes, under a roof—shed, you know.

Q. These little—these eight-pound boxes, they are made up of eight little boxes? [52]

A. Yes, sir.

Q. And are they these little veneer boxes that you see on the market down here with strawberries, or what not, in them? A. Yes, sir.

Q. And your pickers, you say, bring those into the shed on—

A. Most of them go and bring them in themselves.

Q. Bring them to the shed where they are assembled on your orchard?

A. They are taken out of them little boxes, then

(Testimony of G. M. Huffman.)

they put them into the crate which goes to the packing plant.

Mr. BOOTHE.—May it please the Court, I object to this testimony unless they can show that the berries that he picked were the berries in controversy.

Mr. SPENCER.—I will connect that up.

COURT.—I suppose that is what he intends to do.

Q. Did you sell your output of that season of 1920 to H. A. Baker? A. Yes, sir.

Q. And I understood you to say these berries were checked up by the grower after the pickers in his yard had gotten them together and they are put in a little shed? A. Yes, sir.

Q. Where they are kept? A. Yes, sir.

Q. Are they exposed to the sun or not; what is the fact about that?

A. Not any longer than what it takes to carry them in and pick them little boxes.

Q. Now, do you know whether the way you have described as having taken place on your yard is the general way followed around there by berry growers in the vicinity of Salem?

A. Yes, sir.

Q. In the season of 1920 did you have anything to do on your yard with being the receiver station for other growers of berries that [53] were going to Baker? A. Yes, sir.

Q. What was the fact about that?

A. I received there, we made a pool of in the

(Testimony of G. M. Huffman.)

neighborhood of sixty tons on the little patches surrounding me there. They brought them in to this one point and I weighed them up and their trucks came out and received them there in the evening.

Q. Whose trucks do you mean?

A. Mr. Baker's, or sometimes he had some other truck.

Q. Now, were you around there practically every day in that season of 1920?

A. I handled every tray, almost, that went out of there.

Q. And how long had you been in the loganberry business, how much experience had you had?

A. Eight years.

Q. What would you say, Mr. Huffman, as to the condition of the loganberries that were picked in your yard and the berries that came in to your place as a receiving station from the other growers around there—what was the condition of those berries in that season of 1920?

A. They were in good shape, good condition.

Q. And about how long does that season cover?

A. Well, it runs all the way from thirty to thirty-five days.

Q. And what have you to say as to the condition of the berries in the beginning of the season, compared with the condition of the berries at the close of the season, or year?

A. That depends a good deal on the weather.

Q. Yes, sir.

A. If you have hot days the berries get soft,

(Testimony of G. M. Huffman.)

and whether it is the first of the season or the last of the season.

Q. What I am getting at, whether there was any big difference between [54] the condition of the berries one week from those of another week in that season of 1920 that was brought to your notice? A. No, there was not.

Q. And then, as I understand you, the berries as they left that place were in what you have said good condition?

A. As good a condition as I ever handled any, because we had the best service that year of any time I ever had berries.

Q. Now, Mr. Baker's trucks you said picked up the berries from your yard?

A. How was that?

Q. You have already said, I believe, Mr. Baker's trucks came out and picked up the berries from your yard? A. Yes.

Q. And that included the berries that had been assembled there from the other growers, those sixty tons you have mentioned?

A. Well, he would come out with a big truck, if he could not take them out he would send out another truck that night or the next morning early.

Q. What is the fact as to whether or not he kept the berries cleaned up—gathered up?

A. What is the question?

Q. Were there large quantities allowed to remain on hand there a day or so?

(Testimony of G. M. Huffman.)

A. They were picked up as often as they possibly could.

Q. And were there any berries left there at night, running over into the next day?

A. No, never.

Q. Were the berries in that season of 1920—did they show any evidence of being unusually juicy, or what is the fact as to that?

A. No, I have seen it so that the juice would run out of the back of the trucks other seasons, which I never saw during that season. [55] Apparently held up better that year than other years, as we didn't have as hot weather. If the sun is real hot they will leak.

Q. After the berries were picked up and taken away by Mr. Baker's truck to his packing plant you saw nothing more of them? A. How is that?

Q. I say, after the berries left your place and went to Mr. Baker's packing plant you of course saw nothing more of them?

A. No, I was only in there once or twice.

Q. The berries, when would they be weighed?

A. They were weighed twice; I weighed them there as I received them and Mr. Baker, they had to weigh them down there to keep track of everything that went into the warehouse at that time.

Q. Did you check your weights with his?

A. Yes, sir.

Q. And was there any substantial difference between the weights?

(Testimony of G. M. Huffman.)

A. Well, they had a little more weight than I had.

Q. Well, there was no complaint on your part on that ground?

A. The only thing I could account for for that was that they weighed in bulk and I weighed in little weights, you see; they would come in maybe with ten or fifteen crates, I would weigh that. They would weigh a big bulk at one time.

Mr. SPENCER.—You may cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

Did you see any of the berries at the plant—the packing plant?

A. I was there twice, I believe, during the packing season.

Q. Did you see them putting the berries in barrels? A. I saw them put them in.

Q. How did they do that?

A. They have a table where there is a hole cut in the table, the [56] barrels go under this table, take a crate of berries and put a screen over the top —

Q. Screen?

A. A screen, yes, and they turn that crate right over and shake the berries out. That holds the hallocks back. The crate has twenty-four little boxes in it. They put that wire over that to hold these hallocks back, so that they won't come out and go into the barrel.

Q. Did you see them filling a barrel full?

(Testimony of G. M. Huffman.)

A. Not particularly, I never took particular notice of that.

Q. What did they do, beat them down, mash them down in the barrel, or —

A. I never saw them do that.

Q. You didn't see a barrel completely full, then?

A. I never did.

Q. You don't know whether they hammered them down, mashed them in or not, do you?

A. No, sir.

Q. Do you know whether they filled the barrel full or not?

A. No, sir. I merely walked through the plant, I didn't pay much attention to that part of it.

Q. You didn't pay much attention to what they were doing? A. No.

Q. The berries picked in the latter part of the season are usually a little more ripe and soft and ferment quicker than the others, don't they?

A. Well, along about the end it gets hotter and that causes the berries to leak; as far as fermentation is concerned I don't think it would affect them.

Q. The season of 1920 was a pretty hot season, wasn't it?

A. Yes, but it is pretty hard to get the pickers out in the hot part of the day.

Q. Pretty hard on the berries?

A. Yes, it is hard on them, sure. We never cared for our pickers [57] to go out in the mid-

(Testimony of G. M. Huffman.)

dle of the day, if they don't want to go out. We would rather they would go early and late.

Q. Sometimes when they were hauling them in trucks you say the barrels leak out of the cases?

A. I haven't seen any this particular year, because they picked them up too soon. I have had berries before that stood there for thirty-six hours, naturally the juice got away from the berry crates that time.

Q. Did the berries sometimes remain overnight before they were picked up?

A. Not to my recollection did they ever stay overnight. They would come out there as late as midnight to take those away.

Mr. BOOTHE.—That is all.

Redirect Examination.

Q. You say, Mr. Huffman, that you have seen berries other seasons, had them stand out thirty-six hours, as I understand. Was that other times other than this season you had seen them stand out thirty-six hours? A. Yes, sir.

Q. Was there any trouble about fermentation of those?

A. Not that you would notice. If you had cool weather they would not mould and if you had rainy weather they would mould.

Q. Those berries you had out thirty-six hours, did you have any complaint made by anybody that bought them that they fermented?

A. Never had.

Mr. SPENCER.—That is all.

Witness excused. [58]

Testimony of G. F. Heckart, for Plaintiff.

G. F. HECKART, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Where do you live, Mr. Heckart?

A. Seven miles south of Salem.

Q. Are you a loganberry-grower? A. Yes, sir.

Q. How big a yard have you? A. Six acres.

Q. Had that yard in 1920? A. Yes, sir.

Q. Did you sell your crop in 1920 to Mr. H. A. Baker? A. Yes, sir.

Q. And do you live out in the same direction as Mr. Huffman, or near him?

A. Well, Mr. Huffman lives a little southwest and I live directly south, on the State Highway. He lives a little west of me.

Q. Were you one of those whose berries were assembled at Mr. Huffman's place, or did yours go in direct? A. Mine went in direct.

Q. To Mr. Baker's plant? A. Yes, sir.

Q. Was that your first year of loganberries?

A. No, sir, I handled the loganberry business for about seven years.

Q. And you have a yard now? A. Yes, sir.

Q. Will you state whether or not you had occasion to observe the quality of the berries that Mr. Baker bought from you that year? [59]

A. Well, the truck that gathered up our berries

(Testimony of G. F. Heckart.)

usually had a route around on one side and gathered that way and so had berries when he came to our yard, had some berries on his truck, and as far as I remember I never seen anything wrong with the berries, they were in good shape.

Q. What have you to say as to the berries in your own yard that went to Baker?

A. Good; good.

Q. And was there any unusual bleeding of the berries that year?

A. No, sir, nothing unusual.

Q. Any unusual moulding of the berries that year? A. No.

Q. Were berries picked in the same general way and handled by the pickers as Mr. Huffman has described?

A. Generally the same; most everyone has about the same system.

Q. And what is the fact as to whether the growers generally have a berry-shed where they are assembled from the pickers? A. Yes, sir.

Q. And from what point did Baker's trucks pick the berries up, from the shed or—

A. From the shed; from the assembling-shed in the yard.

Q. What have you to say as to the service which Baker gave you in the way of trucks picking up berries in the season of 1920?

A. Excellent. They got our berries every day once a day; sometimes the trucks came around twice.

(Testimony of G. F. Heckart.)

Q. Sometimes twice? A. Yes, sir.

Mr. SPENCER.—You may cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

What was the last dates that the berries [60] were taken from your place?

A. I just don't remember the dates.

Q. Well, how late in the season was it?

A. Well, he taken all our entire crop that year and our season usually runs we figure about sixty days.

Q. The last berries are usually riper and softer, are they not?

A. Not if you pick them at the proper time. You can get soft berries at any stage, if you want, or if you let them overripen. If you keep up you can get good berries the last as well as the first.

Mr. SPENCER.—Did you keep up with the picking?

A. We had pickers there, sure, all through the season.

Witness excused. [61]

Testimony of Clifford Smith, for Plaintiff.

CLIFFORD SMITH, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

What is your business, Mr. Smith?

A. Work on my father's ranch.

(Testimony of Clifford Smith.)

Q. Work on your father's ranch?

A. As a rule, yes.

Q. What were you doing in the loganberry season of 1920? A. I drove one of Mr. Baker's trucks.

Q. Where did Mr. Baker's truck run, that you drove?

A. Well, it ran nearly every place there was berries.

Q. And what work were you doing with that truck?

A. Well, I drove a small truck and I picked up the berries that the larger trucks—where they were overloaded or didn't get it.

Q. Did you have a regular route?

A. Not usually.

Q. What did you do; how did you fill in?

A. I went wherever Mr. Johnson told me to.

Q. Who was Mr. Johnson?

A. Well, he was managing the trucks.

Q. For Mr. Baker?

A. For Mr. Baker at that time, yes.

Q. And where would you leave in the morning, for example, with your truck; from what place would you go? A. From home.

Q. And you would go to whatever place Mr. Johnson would tell you to go, to get berries?

A. As a rule, my father sold berries to H. A. Baker and I lived right close to Mr. Johnson and he had a patch and as a rule I took [62] one in from those two patches in the morning.

(Testimony of Clifford Smith.)

Q. And then you went in and got berries wherever you were directed to get them, is that the idea?

A. Wherever Mr. Johnson told me to.

Q. Will you state whether or not you worked during the entire season of 1920 picking up Mr. Baker's berries that he had purchased from the growers? A. I did, yes.

Q. You would get these berries from what places on the growers' yards? A. From sheds.

Q. And would you make more than one trip, sometimes, to one grower's place a day?

A. If there was more than one load of berries.

Q. Now, did you have occasion to look at the berries during that season of 1920?

A. I looked at every crate I put on there.

Q. Do you know anything about loganberries?

A. Well, some.

Q. Your father grows them? A. Yes, sir.

Q. Well, will you say what was the appearance of the berries as to whether they were hard or firm or soft, or what?

A. When it was cool they were hard; in the heat of the day sometimes they would be soft, some, and run to some extent.

Q. But was that condition that you observed there any different than that that took place in the summer season when it is reasonably warm?

A. It does it every time.

Q. And were there berries left over? Were the berries picked up, cleaned up, each day from the various yards? [63] A. Yes, sir.

(Testimony of Clifford Smith.)

Q. In order to do that was there any particular hours observed by you in driving the truck?

A. I worked all hours.

Q. Picked up any berries at night?

A. Certainly did.

Mr. SPENCER.—You may cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

Did you see them packing any of these berries down at the plant?

A. I walked through the plant sometimes, but I paid no attention to that, whatever.

Mr. BOOTHE.—That is all.

Witness excused. [64]

Testimony of G. W. Johnson, for Plaintiff.

G. W. JOHNSON, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Where do you live, Mr. Johnson?

A. About seven miles and a half south of Salem.

Q. You lived there in 1920? A. Yes, sir.

Q. And what business are you in?

A. I am raising fruit; berries, prunes.

Q. And in the season of 1920 were you also employed by Mr. Baker? A. Yes, sir.

Q. How big a yard do you have—did you have then?

(Testimony of G. W. Johnson.)

A. I have about twelve acres in loganberries.

Q. Had you operated that yard the year before?

A. Yes, sir.

Q. And you operated it since? A. Yes, sir.

Q. What work did you have, if any, around the packing plant of Mr. Baker during the season of 1920?

A. I had bought berries for Mr. Baker for a number of years.

Q. You did what?

A. I bought the berries for Mr. Baker in 1920.

Q. For him?

A. Yes, for Mr. Van Doran, and during the season I took care of the trucks, sent the trucks out to gather in the berries, and I was around the plant all the time.

Q. And in addition to looking after the truck end of it, from Mr. Baker's end, did you have occasion to go out on your own yard at times?

A. I was home every evening. [65]

Q. You were home every evening.

A. Every evening; then I went out amongst the other growers.

Q. Now, would you say that you had been over the various yards? A. Oh, yes.

Q. That Baker bought from during the season of 1920? A. Yes, sir.

Q. What, Mr. Johnson, was the general condition of the berries that Baker bought and took into his packing plant during the season of 1920?

A. Very good.

(Testimony of G. W. Johnson.)

Q. I wish you would describe what you know about the service that was afforded in picking up the berries, how often they were gathered in by the trucks that Baker provided, from the various growers.

A. Well, we tried to gather them in every night. We generally start the trucks out about eight o'clock in the morning. During the busy part of the season we had about seven trucks; we had three of our own and hired four others. We aimed to just keep them picked up. For instance, one man would go out and he came in, I asked him if he got all on that load, that particular grower, and if he didn't I would send another truck out and follow him up. I would stand on the platform and send them out. Mr. Smith had a small truck. In case somebody was off one of the roads I would shoot him out. My idea was not to save expense in getting the berries in.

Q. That service, picking the berries up yourself, from the packing plant, is that usually performed by the packing plant?

A. It was that year. The year before I think we hauled berries, too.

Q. How about last year?

A. We didn't bring them in.

Q. How did the packing plant get the berries last year? A. Last year we didn't pack. [66]

Q. But the seasons before, did the growers bring the berries in themselves?

A. The growers brought them in themselves.

(Testimony of G. W. Johnson.)

Q. Do you know what the practice is now?

A. They bring them in themselves.

Q. While you were picking them up with your own truck, would that—was it any quicker service than when the growers brought them in themselves, or not? A. I think it was.

Q. And as I understand you, from your observation of the berries in that season of 1920 you found no fault with them? A. No, nothing.

Q. You were around the plant a good deal?

A. That year?

Q. Yes. A. Yes.

Q. Did you have occasion to observe as to how quickly they got under way in packing the berries when they came in on Baker's trucks to the packing plant?

A. Yes, we kept them going as fast as they would come in, pack the ones that came in the load before and keep working them up; evenings I think we had them all. Sometimes there might have been a few left over.

Q. In the packing plant?

A. In the packing plant. I went home about six o'clock and I think they worked until eight o'clock.

Q. What do you mean by packing the berries?

A. Putting them in the barrels.

Q. When they were put in the barrels, how big were these barrels?

A. Well, we are putting in now about four hundred and fifty pounds strawberries. I don't *think*

(Testimony of G. W. Johnson.)

put in quite so many loganberries; I [67] am not sure.

Q. What was done with the barrels when the berries were put in there?

A. The Willamette Valley Transfer brought them to Portland.

Q. The Willamette Valley Transfer brought them to Portland? A. Yes.

Q. And were you around there when the Willamette Valley Transfer would pick up the berries?

A. Yes, sir.

Q. How often would they take the berries from the packing plant and bring them into Portland?

A. Early in the season when we had a few barrels they would come and take them as we had them; later in the season, when we got up to so many they had a trailer and truck and when we got twenty-five or thirty barrels we would call them up to load. I think they put about twenty on a truck, maybe twenty on a trailer; maybe not quite that.

Q. Did you see any fermenting of barrels or spoiling of berries around Baker's packing plant that season of 1920? A. No.

Q. How often were you there at the packing plant?

A. I was there about all the time during the day. I was out and in.

Q. Do you know, assuming that the berries would be hauled to Portland in about four hours, what would be the average time, would you say, from the

(Testimony of G. W. Johnson.)

time the berries were picked until they got into the cold-storage plant at Portland?

A. Well, it would be pretty hard to say. I imagine, for instance, the berries were picked in the morning you would get them in Portland that night. Oh, I should say maybe twenty-four hours. I don't think many laid out longer than that, if any, from the time they were picked.

Q. You have had experience in handling berries?
[68] A. Yes, sir.

Q. And you know what length of time you can handle them in that way and not have them ferment?

A. Well, I would not know how long you can handle them in that way and not have them ferment—just how long it would take them to ferment.

Q. Well, have you handled berries in other times longer periods than that in safety, without fermenting?

A. Oh, yes. Well, two years ago the berries didn't come in as good shape as they did that year. That is 1919.

Q. 1919?

A. We didn't get the service from the Willamette Valley Transfer that year and we didn't give the growers the service—didn't have so many trucks.

Q. Was there any difficulty, so far as you know, with fermenting of berries that year 1919?

A. No, sir.

Mr. SPENCER.—Cross-examine.

(Testimony of G. W. Johnson.)

Cross-examination.

(Questions by Mr. BOOTHE.)

What was the process used by Mr. Baker's men up there in packing those berries in barrels?

A. He just put them in the barrels.

Q. Filled the barrels full? A. Yes.

Q. Did they tamp them down?

A. No, we didn't stamp them; we had something like a—what I would call a churn dasher, just simply to smooth the berries off; we didn't mash them.

Q. Didn't they have a thing about eight inches square to beat them down in there, mash them up?

A. No. Yes, sir. [69]

Q. They didn't have? A. What is that?

Q. You say they didn't have that?

A. Yes, they had that; I say they used that simply to level the berries off, not hammer them down.

Q. They used it, then, in beating them down, that had a tendency to break the cells of the berries, wouldn't it?

A. You might say it would, in some cases.

Q. Filled the barrels pretty full before they headed them up?

A. Not as full as we are filling them now with strawberries.

Q. Now, Mr. Johnson, if it should happen—I am not saying it is true, but suppose these berries you are speaking of which were taken by the Willamette Valley Transfer, were fermenting when they were taken to Portland, what would cause that?

(Testimony of G. W. Johnson.)

A. I don't know. I don't know why they should ferment that quick.

Q. Should they have been fermenting by the time they got to Portland the way they were handled?

A. No, they should not.

Q. If we can show they were fermenting when they came here there was something wrong somewhere, wasn't there?

A. I suppose there would be, but there wasn't anything wrong so far as I know.

Q. There would be something wrong in the berries? They would be too ripe?

A. I don't think they were too ripe; not as ripe as they have been in former years.

Q. Were any berries that you had brought in by these trucks moulded? A. No.

Q. Did you examine the berries closely?

A. No, I have seen the tops of the berries when they came in; I didn't examine the berries. [70]

Q. That wasn't your business, to examine the berries, was it? A. No.

Q. Pretty warm season, wasn't it?

A. I don't think it was exceptionally warm, not more than usual; might have been; I don't just remember.

Q. Were they doing anything else besides barreling these berries?

A. That is what we were doing at that place.

Q. Weren't they canning there, too?

A. No, Mr. Kurtz, that was canning, was right

(Testimony of G. W. Johnson.)

across the railroad track. We took some berries over there.

Q. That was for Mr. Baker, wasn't it?

A. That was for Mr. Baker.

Q. They were canning some and barreling the others, isn't that right? A. Yes.

Q. Some of those you saw brought in, some went to the cannery and some were barreled?

A. Sometimes we would send two loads a day or three loads a day to the cannery.

Q. Was there any difference in the selection of what went to the cannery?

A. When I was there I usually picked out the growers that had the nice, big, larger fruit to send over to the cannery.

Q. The largest ones went to the cannery?

A. So many growers have large patches. Now, for instance —

Q. A great many went to the cannery?

Mr. SPENCER.—Let the witness testify.

A. The largest fruit went to the cannery, the cleanest fruit.

Q. And they were canned right there?

A. They were canned right there.

Q. Did any of those blow up? A. Yes. [71]

Q. How many? A. I don't know.

Q. There was a terrible lot of them blew up, didn't they?

A. I think they had some troubles with their top.

Q. What?

(Testimony of G. W. Johnson.)

A. With the tops, their quarts. I was only in the cannery about once or twice.

Q. Isn't it a fact there was a regular cannonading, blowing up of cans that had been canned there?

A. I don't think so. I never worked around the cannery, but I imagine all canneries lose some fruit.

Q. Well, throughout the whole season wasn't the wall covered?

A. No, I don't think you would—

Q. I will ask you, wasn't about ten thousand dollars worth of those cans blown up.

A. I am satisfied they didn't. I don't know how many.

Q. There was a large quantity of them blew up, wasn't there?

A. There was some blew up; and the same year we let Wittenberg-King have a lot and they packed them right there.

Q. How long were they in the can before they blew up? A. The berries?

Q. Yes. A. I don't know.

Q. What was the cause of them blowing up?

A. I don't know that, either. I heard somebody say something the matter with the tops of the cans, had the wrong tops.

Q. The can wasn't strong enough to contain the acid in there, that is about the size of it?

A. I don't think so; I think it was the top.

Q. If the berries had been all right it would not make any difference what kind of a top it had, they would not blow up? [72]

(Testimony of G. W. Johnson.)

A. I think it would have, the way I think.

Q. If the berries were all right?

A. I think they would, yes. I think they would blow up. I imagine it would be just like larger fruit of any kind, blackberries, open them up, they will spoil, ferment.

Q. Did you ever hear of any of those barrels blowing up before they got to Portland?

A. No, I never did.

Q. Did you ever hear of any of those barrels fermenting before they got to Portland?

A. No, I never did.

Q. You never saw them after you got them in the plant there? A. No.

Redirect Examination.

Q. These berries you say were canned in that canning factory, who ran that?

A. Kurtz ran that.

Q. A man by the name of Kurtz?

A. A man by the name of Kurtz.

Q. You don't understand Mr. Baker had a canning factory?

A. Understood he had that along toward the latter part of the season and we took some of the fruit from the platform over to that.

Q. Do you know the reason why the larger, firmer berries might be selected for canning, whereas they might not be selected to go down in the barrels?

A. Ordinarily in the cannery you sort over a berry crate, and they told me to take the nicest, we had some exceptionally nice, well cultivated yards,

(Testimony of G. W. Johnson.)

they are large, any of those came in we were to send them.

Q. Do you understand berries ordinarily canned could be inspected, looked at, and therefore they would select larger berries? [73] A. Yes.

Q. Whereas berries put in barrels, is there any opportunity for inspecting them after you get them in barrels?

A. I never seen any of them.

Q. This business of the cans blowing up there in Kurtz's canning factory, I guess you said you didn't know what caused it?

A. I don't know, unless it was, some said they had had tops—they sent for the wrong kind of tops to their can. I don't know anything about canning fruit. It is just hearsay.

Q. Did you see any berries that came in there that year of 1920 that were too ripe to handle?

A. No.

Q. And you have been in the berry business how long before that?

A. I have been in the berry business about seven or eight years.

Mr. SPENCER.—That is all.

Recross-examination.

Q. There was a man there, a chemist by the name of Professor Van Eschen, or some such name as that. Do you know him? A. Yes.

Q. Did I pronounce his name right?

A. That is about the name. I know him.

(Testimony of G. W. Johnson.)

Q. Something like that. He was a kind of superintendent over there?

A. He was over at Kurtz's. I saw him over at Kurtz's.

Q. Do you know, as a matter of fact, that he condemned a lot of those berries that came in there and would not let them put them in barrels at all?

A. I don't know that.

Q. You don't know that he condemned a lot of them that were mouldy and would not let them put them in? A. No, I don't know.

Q. Do you know whether any of them were condemned? A. No. [74]

Q. Could it have been done without your knowledge?

A. Yes, I wasn't at that plant much of the time.

Redirect Examination.

Q. This man Kurtz operated a cannery there; did he buy loganberries too? A. Yes.

Q. How did he get his loganberries in from the growers, did he furnish this truck service like Baker?

A. I don't remember whether he did or not; no, I don't think he did, I think the growers hauled their berries in to him. I am not sure.

Q. And he had berries there that he had picked up around one place and another? A. Yes.

Witness excused.

Testimony of L. B. Gregg, for Plaintiff.

L. B. GREGG, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Where do you live, Mr. Gregg? A. Salem.

Q. And what is your business?

A. Well, for the last four years winter time I attended the Oregon Agricultural College, and summer I worked for the H. A. Baker Company at Salem.

Q. Were you working for Mr. Baker in the loganberry season of 1920? A. Yes, sir.

Q. What were you doing there?

A. I was receiving and weighing the fruit.

Q. Receiving and weighing the fruit?

A. Yes, sir. [75]

Q. And just what were your duties in that respect?

A. Well, every truckload of berries that came in, backed up to the platform and loaded onto smaller platforms, be trucked over to the scales and I would weigh them and take the weights and my helpers would take them on to the dumping tables.

Q. And in doing that work, Mr. Gregg, did you have occasion to see what berries were coming in there and what their condition was?

A. Yes, sir, I had a very good chance to see everything.

(Testimony of L. B. Gregg.)

Q. You say you had been in that work how many years before?

A. I worked for Mr. Baker—for the H. A. Baker Fruit Company, for four years, and I have worked in canneries three years previous to that.

Q. And during that time you, I suppose, have had occasion to see a good many barrels of loganberries? A. Yes, sir.

Q. Will you state what was the condition of these loganberries that Mr. Baker gathered up from the growers as they came into the packing plant?

A. Why, the berries that were brought in that season were very good, in comparison with previous years that I had anything to do with loganberries. I would say it was the best year that I ever saw loganberries.

Q. Do you know as to the methods provided by Mr. Baker for gathering them up that year?

A. Yes, sir.

Q. And did that speed up matters as to delivery to the packing plant?

A. Yes, sir; that helped.

Q. Would you say that, from your observation of those berries in that season of 1920, that there was any quantity of them, any of them, that were spoiled or that were overripe or anything of that sort? [76] A. No, sir; there was not.

Q. Now, after the berries left your hands when they were weighed, what was done with them?

A. They were trucked on down to the warehouse, where the men who put them in the barrels were at

(Testimony of L. B. Gregg.)

work, and they would take them there and put them in the barrels.

Q. What were they in when you got them to weigh them?

A. They were in the crates, hallock crates.

Q. What is the twenty-four—what do you call them?

A. Twenty-four hallock crates, small boxes, market boxes, twenty-four of them to a crate. These were loaded on to a small platform that would hold approximately thirty crates, a small iron truck was wheeled on to the platform, hoisted up and the truck carried to the scales and the truck also—the platform also, and the iron truck pulled out from underneath it, weight taken, the tare taken off the crates.

Q. That is the weight of the crate?

A. That is the weight of the crates and the platform which is holding it.

Q. That would be deducted from the total weight so as to get the net weight of the berries?

A. Yes, sir.

Q. Now, these twenty-four little boxes, were they piled on top of each other, or were they all flat?

A. Oh, the twenty-four were all full, open in the crate.

Q. So that did you have opportunity to see the tops of those twenty-four small boxes of berries?

A. Yes, sir.

Q. As you weighed them. Who took the berries, what was the job of the next man beyond you after

(Testimony of L. B. Gregg.)

you weighed them? Somebody take them and put them in the barrels?

A. Yes, that was the next step in the process, was putting them [77] in the barrels.

Q. And do you know about how often the berries were picked up by the Willamette Valley truck men after they were put in the barrels for transportation to Portland?

A. Yes, I was on the platform all the time.

Q. And will you just describe about how often that was done?

A. Well, it was done just as often as we would let them come. They were very anxious to get the patronage of this firm. The barrels were very easy things to haul. The bulk and the weight mounts up very fast, the easiest thing to haul for the weight, probably that there is, is barrels. These men wanted to haul them, were anxious to haul the berries. I think approximately five minutes after we telephoned to the firm that the trucks would be down there backing up to our platform, getting ready to take the barrels.

Mr. SPENCER.—Cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

Did they put any ice in the barrels to keep them cool? A. Yes, sir.

Q. In all of them? A. I believe they did.

Q. How much ice did they put in?

A. Well, I am not sure about that year. There

(Testimony of L. B. Gregg.)

before that year they had put in some ice. Yes, they put in ice that year, too.

Q. You said they put in ice during that year?

A. Yes, they put in ice.

Q. 1920. Don't you know there was a law passed they could not do that in 1920, wouldn't allow that in 1920? A. No, sir, I don't know that.

Q. Isn't that right? I want to be correct on that?

A. I am not sure. I am sure I don't know whether there is any such law. [78]

Q. Of course I didn't want you to be sure about the law, but the facts are what I want you to state. You say they did put ice. A. Yes.

Q. And how much?

A. I don't remember now. I never measured.

Q. Did they put ice in every barrel?

A. Yes, must have, if that was the year that I am thinking of, it has been two years and I worked for this firm for four years. I believe that is one of the years we put ice in the barrels.

Q. What part of the barrel would you put the ice in? A. Put it all through.

Q. Just through it, here and there?

A. No, distribute it through, three different times, I believe. I used to do that job myself, is the reason I know. This year I had no occasion to see the barreling process, only from a distance. Two years before, when I first started to work I did that work. I can tell you how I did it that year. I put in three boxes of ice to every barrel of berries. It was dis-

(Testimony of L. B. Gregg.)

tributed through the barrels so it would be approximately an even layer of berries between each layer of ice.

Q. Ice cracked up? A. The ice was cracked.

Q. In packing those barrels did they tamp them with a maul or something—in packing the berries in barrels did they hammer it down with a maul?

A. They had this leveler they speak of. I would not call it a maul. I forget what the boys did call it, They had a stick.

Q. How big was it?

A. I think it was made out of a broomstick.

Q. How big was the bottom of it, where they leveled? A. That was probably a foot long.

Q. And how wide? A. About four inches.
[79]

Q. Some like a 4x4, was it, fastened to a broom handle? A. Four by four?

Q. Yes, you say about a foot long and four inches wide.

A. It wasn't four inches thick, it was about 4 by 1.

Q. How is that?

A. It was about four inches by one inch thick—about one inch thick, four inches wide and a foot long.

Q. And an inch deep?

A. You are speaking of the part on the end, I presume. I said the broom handle was what it was fastened on to.

Q. What was the weight of that thing they hammered it down with, then?

(Testimony of L. B. Gregg.)

A. Probably two pounds.

Q. About three pounds?

A. Two pounds, pound and a half or two pounds.

Q. How did they do, come down on it hard enough to mash them up, or not?

A. Why, I think they did, yes.

Q. The berries were made into a pulp, were they not, intended to be made into a pulp?

A. No, not intended to be made into a pulp, just simply to get the berries to settle.

Mr. BOOTHE.—That is all.

Redirect Examination.

Q. Was this business of packing the berries in the barrel, was that done that year substantially as it had been done years previous?

A. Yes, sir; the same.

Mr. SPENCER.—That is all.

Witness excused.

Testimony of Dave Adolph, for Plaintiff.

DAVE ADOLPH, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows: [80]

Direct Examination.

(Questions by Mr. SPENCER.)

Your name is Dave Adolph? A. Yes, sir.

Q. Where do you live? A. Salem, Oregon.

Q. And how long have you lived up there?

A. Practically seventeen years.

Q. What were you doing in the season—logan-berry season of 1920?

(Testimony of Dave Adolph.)

A. I was barreling loganberries for Mr. Baker.

Q. You will have to talk so the jury can hear you.

A. I was barreling loganberries for Mr. Baker.

Q. Who was working with you?

A. My cousin Rex Adolph.

Q. What was your job in the packing plant there?

A. My job was to take the full crate of loganberries, put the screen over it and dump them into the barrel and then I took the empty crate, give it to my cousin outside and he was stacking them up and after I had barreled practically five or six barrels, why, he would take a turn at it.

Q. And you took them after they had been weighed by Mr. Gregg? A. Yes, sir.

Q. And did you work there the entire season of 1920? A. Yes, sir.

Q. And did you have occasion to see practically all of the berries that Mr. Baker bought that went through the packing plant and were packed?

A. Yes, sir.

Q. Now, what would you say, Mr. Adolph, as to the condition of the berries that you saw there as you worked with them day by day that season?

A. I think the berries were in very good condition.

Q. Did you notice any quantities of berries there at all that seemed to be overripe or mouldy, or anything of that respect?

A. No, I would not see any quantity.

Q. Just describe, will you, again, how you packed the barrels, put [81] them into the barrels, what was done?

(Testimony of Dave Adolph.)

A. We had a long table that had a hole in it, and the hole was not quite as large around as the top of the barrel and the barrel would fit on a little truck, would fit under this table and we had little square frames, they had us make four wires running length-wise of them and possibly four or five running the width of them; they were very large wires and the wire was set over the crate, the crate was put upside down over the hole and the berries were jarred out and these wires helped to hold the little hallocks, the little market boxes, in the crate.

Q. Helped hold them from going down into the barrel?

A. They kept them out of the barrel.

Q. And how full would you fill up the barrels?

A. Well, we were supposed not to fill them too full, within about three to four inches of the tops; there is a little groove about one-half inches from the top and put them about two inches from that, as the head of the barrel fits that.

Q. Now, these berries brought into Mr. Baker's packing plant there, what have you to say as to whether or not they were kept inside in the shed while in the packing plant?

A. They were brought on the platform and as much as I could say were immediately hauled to the scale and from there were brought immediately to the table where I was and dumped in the barrel.

Q. What is the fact as to whether or not you kept up with the operation? That is, as soon as they

(Testimony of Dave Adolph.)

were weighed, did much time elapse before you got them and put them in the barrel?

A. No, not much time, the berries never stood in the plant while we were working over two hours, or an hour.

Q. Then who took charge of the barrel after you put the berries in?

A. Well, then we took a hook and dragged the barrel over to a man we call the cooper and he put the head in the barrel.

Q. He did that work, did he? [82]

A. He did that work.

Q. You had nothing to do with the coopering the barrel? A. No.

Mr. SPENCER.—You may cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

You said something about you didn't see any great quantity of overripe or mouldy berries; did you see any?

A. Why, bad berries, I remember seeing maybe just a few in maybe the bottom of a box, to the last.

Q. What did you do, put them in the barrel?

A. No, threw them out; we didn't barrel any bad berries at all; threw them out.

Q. They were canning some berries that came in at the same time, were they not?

A. I do not know anything in regard to the canning.

Q. Don't you know they took some berries over to the cannery and some to the barrels?

(Testimony of Dave Adolph.)

A. Yes, I know they took some to the cannery.

Q. Some of these same truckmen took them over there, did they? A. I don't know.

Q. Who took them over to the cannery?

A. I don't know.

Q. Were they sorted out and good ones taken to the cannery? A. I do not know.

Q. Was any ice put in the barrels?

A. I think Mr. Gregg made a mistake; there was no ice put in that year.

Q. About their mashing the berries down in there, was he correct—was Mr. Gregg correct about that, about the way they hammered them down in there?

A. I don't remember what he said, sir.

Q. How did they do that?

A. He wasn't quite correct in his statement of the thing we used [83] to level them off. It was round rather than—more oblong shape and it was used to level off the berries. When you are passing this crate over the hole and the berries come out, it has a tendency to fill out in the middle and not on the sides.

Q. You put some weights to shove them out?

A. Any more than to level them out.

Q. When you put the berries in the barrels, did they get mashed up in that process? A. No.

Witness excused.

Testimony of George N. Ireland, for Plaintiff.

GEORGE N. IRELAND, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Mr. Ireland, you are a little hard of hearing?

A. I am a little hard of hearing.

Q. Well, I will talk as loud as I can and if you can't hear me you tell me so. You live in Salem?

A. Yes, sir; 1092 Broadway.

Q. How long have you lived up there?

A. I have lived in and around Salem for twelve years.

Q. And what were you doing in 1920?

A. I was working the summer season for Mr. Baker.

Q. Working for Mr. Baker; and what did you have to do with his packing plant, what were your duties there?

A. Well, I was working under Mr. Van Doran.

Q. The jury cannot hear you, Mr. Ireland, I think.

A. I was working under Mr. Van Doran, to see and take care of the plant, look after it while he was absent, or even while he was there. [84]

Q. Mr. Van Doran was in charge there then for Mr. Baker? A. Yes, sir.

Q. You were working with and under Mr. Van Doran?

(Testimony of George N. Ireland.)

A. Working under Mr. Van Doran's instructions.

Q. Had you worked previous years for Mr. Baker? A. Yes, sir.

Q. How many years?

A. I think I began with Mr. Baker 1917, the Fall of 1917, I think.

Q. And did you work for Mr. Baker in the season of 1920? A. Yes, sir.

Q. That was—are you working for Mr. Baker now, this present season? A. Yes, sir.

Q. Now, just describe to the jury what your duties were about there, how much you were about the plant and what you did.

A. Well, I was at the plant all through the season, all through the berry season and I was what you might call the boss; I would discharge men, lay them off, and seen after the business in full, as far as that is concerned.

Q. Did you have occasion, Mr. Ireland, to see many of the berries that came in, as they came in from the growers' yards? A. Yes, sir.

Q. And how much opportunity did you have for such inspection?

A. I had all, I guess, because that was my business, to see after those things.

Q. And what would you say was the condition of the berries that came in from the growers in that 1920 season? A. I call them good.

Q. Now, what is the fact as to whether or not they were picked up with reasonable promptness by the trucks from the growers' yards?

(Testimony of George N. Ireland.)

A. Well, my job was in the house; I knew nothing about the outside work.

Q. Well, sir, when they came into the packing plant, then, what was [85] done with them as to getting them packed and how much time was consumed, generally, at that job?

A. Well, that depended. I have sent berries out, after they were put in the barrels, I have had them out on the road, I suppose, for the cold storage in less than an hour, and then of course others took longer. For instance, after work hours come, the berries would come in and would be worked up early in the morning. I had no occasion to hold old berries over or to work stale berries, simply because we were letting Wittenberg-King have berries, fruit, at that time, and I had no occasion to hold old berries, for if I saw I was going to get overstocked, anything of that sort, they were shipped to Wittenberg-King.

Q. Where was the Wittenberg-King Plant?

A. They were located south of where we were.

Q. That was right there in Salem?

A. Yes, three or four blocks.

Q. So, as I understand you, if any berries were left over that could not go on the trucks that night you shipped them to Wittenberg-King?

A. I had no occasion to use old berries, if I saw I was liable to get overstocked they were weighed out and shipped over to Wittenberg and King.

Q. Do you know as to the service that was given by the Willamette Valley Transfer people in truck-

(Testimony of George N. Ireland.)

ing the stuff away from the plant and getting it to Portland? How often did they come around?

A. They came whenever we called them and we tried always to call them before we had got a load for them. As a—generally speaking they were waiting for the last barrel of their load to be put on the truck.

Q. Assuming that the Willamette Valley Transfer people would get those barrels down to Portland to the cold-storage plant within four hours of the time they got them from you, about how long [86] would it have been between the time the berries were picked until they got in cold storage, on the average?

A. Oh, I will only answer that question how long they were in the house.

Q. All right, how long were they in the house, how long from the time they got in the house until they got in cold storage?

A. I have had them after they got in the house in cold storage in five hours—less than five hours, and some twelve hours, when they got in at night after the work was quit and got them the next morning.

Q. Were many carried over?

A. In the barrel?

Q. Yes.

A. None; there wasn't a barrel stayed in the house over night.

Q. Do you know the kind of trucks—the equipment, that the Willamette Valley people used to bring them down to Portland in?

(Testimony of George N. Ireland.)

A. Well, not particularly. They used hoists in their trucks, covered trucks.

A. That is what I am getting at: how were those trucks constructed, as to protecting the berries until they got here?

A. They were frame, some of them canvass tops and wooden sides and back and all closed in.

Q. You say they were all closed in?

A. They were all closed in.

Q. You would see the loads as they were made up there, before they left the packing plant?

A. I didn't quite get that.

Q. Did you see the truckloads as they were made up at the packing plant and before they left?

A. Oh, yes, indeed, I saw them. They were all loaded and got out in good shape. I often, myself—I never had a barrel leave the plant laying down. I made them put them on edge, haul them heads up. [87] I know I had one driver unload, I went out while he was loading and he had some barrels laying down and I had them unload them and put them on edge, heads up.

Q. Why would you have them loaded with heads up?

A. Because in riding the stave, if there was pressure, anything of that sort, the stave of the barrel would be liable to get sprung and with heads up there is no danger.

Q. Now, Mr. Ireland, just describe to the jury what these barrels were like; what kind of barrels were they.

(Testimony of George N. Ireland.)

A. Well, you mean what kind of wood?

A. Yes, what are they made out of, how were they made?

A. I suppose they are made of fir; I should think so; I have no authority for that.

Q. How big are they? A. Fifty gallon.

Q. And do you know anything about the inside construction? Are they—

A. They are paraffined all nicely inside.

Q. Paraffined inside; what is that for?

A. That is to make them air-tight, I suppose.

Q. And the heads; how are the heads constructed?

A. I didn't get that exactly.

Q. Well, the head of the barrel, is that a solid piece of board, or how thick?

A. Well, it is supposed to be solid; of course there are seams in the head, and they are what is called—

Q. Grooved?

A. No, pegged together. They are jointed and pegs in them to hold them. Whenever they are coopered down, as they are supposed to be airtight, and I saw them; there were no leaks in the barrels before they left, for I tested, or had tested, every barrel that was put up. I had it turned down on its side, rolled on its side, so as to see [88] if there was leaks in the head. If I found a leak in a barrel, any juice came out, it was either re-barreled and fixed so that leak was stopped before it left.

Q. Did you see any loganberries there in that

(Testimony of George N. Ireland.)

season of 1920 that were fermenting that went into those barrels?

A. There wasn't fermented before they went in and I am sure after they went in there, of course they went out in good shape.

Q. Were there any barrels before they left the packing plant they were swelled heads, or burst out, anything of that sort?

A. Never had a barrel burst in the plant; never did.

Q. Do you know how long you can keep loganberries after they are packed and before putting in cold storage without fermenting?

A. Oh, no, I ain't posted.

Q. Now, these berries that were picked at the various growers around Salem all went through this packing plant of Mr. Baker's as you mentioned?

A. You mean that he didn't have any other packing plant?

Q. Yes.

A. No, I don't think so; that was the only big plant I guess Mr. Baker had there.

Q. Do you know about how many barrels he had packed and sent to Portland that year of 1920?

A. I think it was around sixteen hundred, more or less; around sixteen hundred.

Q. Now, when did you next see any of those barrels of Mr. Baker's after they left the packing plant? A. How is that?

Q. When did you next see any of those barrels of loganberries after they left the packing plant?

(Testimony of George N. Ireland.)

A. I came down to Portland on the sixteenth of August and went to the cold storage.

Q. Who were you with? [89]

A. Well, indeed, I won't tell you now. I brought a gentleman down that worked for me to see after this business, but I disremember his name.

Q. Was Mr. Van Doran along?

A. Mr. Van Doran was down.

Q. You went over to the cold storage plant?

A. Yes, sir.

Q. Where did you go, over there?

A. I went into the basement and went into the cold storage and where those barrels were.

Q. What condition did you find the barrels in on the sixteenth day of August in the cold-storage plant?

A. I found them thawed out; found a great many of them in very bad shape.

Q. First of all, did you observe the temperature in the cold-storage plant on the sixteenth of August?

A. I found it hovering around thirty-six above.

Q. How long were you there, Mr. Ireland?

A. I was in there on the sixteenth and seventeenth. I came out I think somewheres around four o'clock on the seventeenth, that is.

Q. And what time did you go in on the sixteenth? What time did you go in?

A. Well, we came in from Salem, it must have been between ten and eleven o'clock, somewheres around there; we came from Salem that morning.

(Testimony of George N. Ireland.)

Q. Did you spend the afternoon there?

A. Yes, sir.

Q. And you were there the next day until about four o'clock? A. Yes, sir.

Q. Seventeenth of August. On the seventeenth of August you were there until about four o'clock in the afternoon? A. Yes, sir. [90]

Q. And was the temperature hovering around thirty-six all of that time?

A. When I left there on the seventeenth, evening, why, they were getting a little bit of frost on the pipes.

Q. On what?

A. Getting a little bit of frost on the pipes.

Q. Now, just describe to the jury something about the way these pipes were and how the room was located there.

A. Well, I suppose that you gentlemen know that those pipes run through the refrigerator—that is through the cold storage, and whenever the cold storage is doing its duty those pipes are all covered with ice and frost.

Q. When you went there on the sixteenth what was the condition of the pipes as to whether there was any or much frost on them?

A. There was no frost on the pipes.

Q. Well, now, what did the barrels look like when you went there? Tell the jurors what appearance they had?

A. They was barrels that I re-headed and re-filled, that had blowed out, and blowed out the

(Testimony of George N. Ireland.)

berries, that I took the one piece of the barrel, put to another to make a full barrel of it, and I found no ice in those barrels at that time.

Q. How general was that condition, Mr. Ireland, as to blowed heads? A. How general?

Q. Yes, how general was it.

A. Do you mean how many?

Q. Yes.

A. Oh, there was quite a few. I must have fixed up, re-headed—re-coopered, I must have re-coopered around fifty barrels, and then I did not get to do the job.

Q. What was the condition of the other barrels you didn't re-cooper?

A. Well, it was soft; that is slushy. [91]

Q. Did you see any barrels with holes having been punched in the top of the heads?

A. I did.

Q. How many?

A. Quite a number; I didn't count them, but quite a number of barrels that was punched.

Q. Would you say there were any barrels there at all that had not been punched with nail holes?

A. I could not say whether there wasn't barrels in the house that had not—

Q. Could you see any?

A. I don't think I looked at any barrels that had not.

Q. Those that had nail holes in the head, was there anything coming out of the holes?

A. They had been—they were all covered, and

(Testimony of George N. Ireland.)

some of the heads and chines, there was juice coming out and standing on the top.

Q. Were any of those barrels bubbling through the nail holes when you were there?

A. I don't get exactly what you mean.

Q. I say, was any juice bubbling through the nail holes when you were there?

A. To be sure there was. Once in awhile you would see a bubble come out, but the main pressure had gone out of those barrels at that time through those holes and breaks.

Mr. SPENCER.—You may cross-examine.

Whereupon proceedings herein adjourned to Tuesday, June 13, 1922, at 10:00 o'clock A. M. [92]

Portland, Oregon, Tuesday, June 13, 1922.

10:00 A. M.

GEORGE N. IRELAND, resumes the stand.

Direct Examination (Continued).

(Questions by Mr. SPENCER.)

Were those barrels numbered?

A. Yes, sir.

Q. They were numbered from one, two, and so on, up, consecutively? A. Yes, sir.

Q. What kind of number was that? Where was it placed on the barrel?

A. It was placed on the head of the barrel. For instance, it began with number so and so, and gross and net and tare, and so on.

Mr. SPENCER.—You may cross-examine.

(Testimony of George N. Ireland.)

Cross-examination.

(Questions by Mr. BOOTHE.)

Mr. Ireland, your business is that of cooper, is it?

A. How is that?

Q. You are a cooper, are you? Is that your trade? A. I was?

Q. Yes.

A. No. I do some little coopering, but we had a man for that purpose.

Q. Were you present there during the time they were putting these berries in the barrels?

A. Was I there at the time?

Q. Yes. A. Yes, sir.

Q. How did they put them into the barrels?

A. Put them into the barrels through a hole in the table. With the barrels set under the table supposed to save waste or anything. If anything fell it fell on the table. The hole was a little bit smaller than the barrel.

Q. Did they mash them down with anything?

A. We leveled them down with a small level.

[93]

Q. What did you have to do that with?

A. Well, I had a hole bored in a board, say, for instance, six inches in diameter, with a broom handle, to level them down.

Q. Did you hammer them down in making them go in?

A. Only leveled them smooth, so that way they would be smooth in the barrel.

(Testimony of George N. Ireland.)

Q. You hadn't any board for that purpose, did you? A. How is that?

Q. You hadn't any board just for the purpose of leveling them up?

A. We did simply because in putting berries in a barrel, this barrel set close up under the table, if you hadn't they would be heaped up in the middle, if you roll the barrel out the berries would go out on the floor.

Q. Were they canning berries as well as putting them into barrels? A. How is that?

Q. Were they canning berries there as well as putting them into barrels?

A. Not in that building.

Q. They had two buildings, did they?

A. Yes, sir, Mr. Kurtz did the canning; I had nothing to do with that.

Q. They were close together, were they not?

A. Oh, there was a railroad track between—alley between.

Q. Did the same trucks which brought the berries to your plant deliver berries to the canning plant? A. I am awfully hard of hearing.

Q. Did the same trucks that brought the berries to your plant take the berries to the canning plant as well?

A. Well, there was some of the berries brought through to my plant and taken—while they wasn't our berries, unloaded directly over at the other platform.

(Testimony of George N. Ireland.)

Q. Do you know whether it is a fact that they put the best berries into the cans and the others into the barrels? [94]

A. As far as that is concerned, I wasn't in the canning room but very little, Mr. Boothe: I don't know much about the canning proposition. My job was barreling.

Q. Were any of those barrels that you put those berries in filled with nail holes before you started them? A. They wasn't.

Q. Were none of them?

A. They wasn't, sir. I have no authority to do anything like that.

Q. Do you know whether or not there were any cans blew up in that canning plant next to you?

A. The canned berries?

Q. Yes.

A. There is a certain per cent of all canned fruit I think blows up; yes, sir.

Q. What.

A. I think there is a certain per cent of all canned fruit they waste, yes, by explosion.

Q. Do you know what percentage that was?

A. No, sir.

Mr. BOOTHE.—That is all.

Redirect Examination.

Q. Mr. Ireland, on this question of nail holes, I understood you to say that—you may correct me if I am incorrect on that—that you laid the barrels down and rolled them there after they were packed to see if everything was all right?

(Testimony of George N. Ireland.)

A. Every barrel was tested before it left the house, laid down and rolled, to see that there was no leakage; if so it was corrected before it left the house.

Q. This question of canned goods, did I understand you to say that there is a certain percentage of loss in canned goods?

A. That is what the canneries tells me, that they figure on a certain [95] percentage of canned goods, certain percentage of loss on it.

Q. This canning plant, was that in the same building as Mr. Baker's packing plant?

A. It was not.

Q. And it was—how far away, where was it?

A. Well, there was an alley, railroad track between the two buildings.

Q. And who was operating that canning plant there during that season of 1920?

A. It was operated under Mr. Kurtz.

Q. Kurtz? A. Yes.

Q. And do you know where Kurtz got his berries? A. No, I do not know.

Q. Was he a buyer of berries from the growers?

A. He handled some berries, yes, sir, I think.

Q. And do you know how he got his berries in from the growers? A. How?

Q. Do you know how Kurtz got his berries in from the growers?

A. Well, indeed, I don't. Of course he had a truck of his own but whether he delivered his own

(Testimony of George N. Ireland.)

berries or had somebody else I don't know about that.

Mr. SPENCER.—That is all.

Witness excused.

Testimony of J. W. McGee, for Plaintiff.

J. W. McGEE, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Where do you live, Mr. McGee?

A. 819 Albina Avenue, Portland.

Q. What is your business? [96]

A. Truck driver.

Q. Were you driving a truck in the months of July and August, 1920? A. Yes, sir.

Q. For whom?

A. Willamette Valley Transfer.

Q. Did you have anything to do with hauling barrels of loganberries for Mr. Baker from Salem to Portland? A. Yes, sir.

Q. Where did you deliver those berries in Portland?

A. Over across the river here at the cold-storage plant.

Q. Is that the National Cold Storage and Ice Company?

A. That is the National Cold Storage and Ice Company.

Q. That is the one that is operated by the Reids?

(Testimony of J. W. McGee.)

A. Yes, sir.

Q. What kind of a vehicle did you have?

A. I had a two-ton G. M. C.

Q. That was the truck? A. Yes, sir.

Q. How was the truck equipped, as to covering?

A. Had canvas sides, top on it.

Q. And were you familiar with the other trucks that the other boys operated? A. Yes, sir.

Q. How were they built as to covering, sides and top?

A. Two or three of them had sheet iron sides and canvas tops. Two more besides mine that had the canvas sides.

Q. Who were the other drivers of the trucks that summer? A. Bailey and Bauer and Hicks.

Q. Did you take barrels of loganberries from the Baker packing plant at Salem?

A. Yes, sir. [97]

Q. Now, about how many trips a day would you make with those barrels of berries?

A. I would only make one.

Q. And when, ordinarily, would you make that trip, day or night?

A. Generally left Salem about six o'clock.

Q. In the evening? A. Yes, sir.

Q. And will you state about what your average time that summer was in operating that truck from Salem to the cold-storage plant?

A. About three and a half or four hours.

Q. Was there any limitations on speed that year?

A. No, sir.

(Testimony of J. W. McGee.)

Q. How many barrels, ordinarily, would you take on your truck coming down?

A. Well, it would vary; some times we got three or four, other times we got fourteen one load.

Q. Sometimes did you operate a trailer with your truck?

A. No, I don't operate no trailer.

Q. You didn't, but did some of the other boys operate a trailer? A. Yes, sir.

Q. And when they had trailers about how many barrels would they haul, with the truck and trailer?

A. Oh, they would run around from twelve to twenty on each vehicle.

Q. Twelve to twenty on each vehicle, or twenty to forty on the two? A. Yes.

Q. Now, what was done that summer, do you know, with respect to keeping the barrels covered up on the trucks; were they in the sun as they came down from Salem, or in the shade, or how?

A. No, they were in the shade.

Q. Did you have anything over the end of the truck? A. A tail curtain. [98]

Q. A what? A. A tail curtain.

Q. And did you see the trailers that the other boys operated? How were they equipped as to having any covering?

A. Well, they had canvas tops on them and canves sides, the same as the trucks did.

Q. Now, when you got down to Portland with the barrels of loganberries, what did you do with them?

A. Took them over here to the cold storage.

(Testimony of J. W. McGee.)

Q. And when you delivered them to the cold storage would you get any kind of a receipt from the cold-storage people?

A. If I could find any of them I would.

Q. What say?

A. If I could find any of them I would get a receipt.

Q. Well, did you generally find somebody around there?

A. Sometimes have to get on top of the ice cars to find them.

Q. But you generally found them there?

A. Yes, sir.

Mr. SPENCER.—I will ask that this package of papers be marked for identification.

(Papers marked Plaintiff's Exhibit 1 for Identification.)

Q. I will hand you, Mr. McGee, a package of papers purporting to be receipts for barrels of loganberries, and ask you to state whether or not you identify those. A. Yes, sir.

Q. What does that package of papers consist of?

A. That is receipts for barrels of berries that we delivered at the ice plant.

Q. Do you recognize those receipts as having been—some of them, at least, having been given to you for barrels of loganberries which you delivered?
[99] A. Yes, sir.

Q. Do you identify the signatures on the bottom of the receipts? A. Yes, sir.

(Testimony of J. W. McGee.)

Q. And whose signatures are they?

A. Mr. Horne.

Q. Who is Mr. Horne?

A. That is the night man over there.

Q. For the cold-storage people? A. Yes, sir.

Q. And who else?

A. There is one man I can't make that out.

Q. That is Horne too. Who was Mr. Patton?

A. Mr. Patton was the day man, I think.

Q. And who was Mr. Kennedy?

A. Mr. Kennedy I think was an office man.

Q. I notice some of these receipts signed by William Reid; seems to be William Reid. When those barrels of loganberries were delivered by you to the cold-storage people what, if you know, was the practice on the part of the cold-storage people to note on the receipts the bad condition of any barrel that might be in a bad condition?

A. All the berries that I delivered there were marked on them if there was anything wrong.

Q. And do you know whether that was the practice during that season of 1920 on those deliveries?

A. Well, it was always with mine.

Q. Mr. McGee, what was the condition of the barrels which you hauled down when you made delivery of them to the cold-storage people?

A. It was all in good shape except the ones marked there.

Q. About how many barrels during the season of 1920, as you now recall, did you deliver which were in bad condition?

(Testimony of J. W. McGee.)

A. I think there were four, as well as I remember; two on one load and two on another load.
[100]

Q. And you were hauling throughout that entire season, were you? A. Yes, sir.

Q. What, if any, opportunity did you have for inspecting the barrels as they were unloaded?

A. I unloaded them all myself.

Q. And you had opportunity, did you, to see the heads of the barrels? A. Yes, sir.

Q. And the bottoms? A. Yes, sir.

Q. Except for the ones that you have mentioned, you say four that you recall, were those barrels sizzling and bursting the heads out when you made delivery to the Cold Storage Company?

A. No, sir.

Q. Now, what would be done with the barrels after they were taken off of your truck, so far as you know?

A. So far as I know they were left there in the aisle.

Q. What have you observed there as to the prompt taking of the barrels by the cold-storage people and putting them into the refrigerator-room, or the freezing-room?

A. Well, I had pulled in there at times and had to roll the barrels out of the way to get mine in, that had already been delivered.

Q. Do you know how long, for example, barrels had remained there in the aisles after delivery and before they were taken away?

(Testimony of J. W. McGee.)

A. Well, the trucks would generally leave about three hours ahead of me in Salem. How soon he got there—I suppose he made the trip as quick as I did—

Q. Your running time averaged about the same time, did you not? A. Yes, sir.

Q. Well, if you found barrels in there when you got in and the truck at Salem had left about three hours ahead of you and made [101] about the same time you did, how long would you say the barrels had been there from the previous load?

A. About three hours and a half or four hours.

Q. And those barrels had not yet been placed in cold storage by the cold-storage people?

A. No, sir.

Q. What do you mean by the aisle in the cold-storage plant there?

A. Well, it is the entrance that goes between the ice bunkers, I reckon they call it.

Q. Was that in the ice-room, or where there were refrigerator-pipes?

A. No, just an aisle. The truck went between them.

Q. Except for the barrels that you have mentioned—four, I think you said, that were in bad order that you delivered, did you observe any fermentation of barrels that you delivered there?

A. No.

Mr. SPENCER.—Cross-examine.

(Testimony of J. W. McGee.)

Cross-examination.

(Questions by Mr. BOOTHE.)

Do you know, Mr. McGee, what the distance is from Salem to the cold-storage plant where you hauled these goods?

A. About fifty-two miles.

Q. You have stated that your truck is one covered with canvas. What kind of wheels do you have?

A. What kind of what?

Q. What kind of wheels on the truck; what kind of tires? A. Solid tires.

Q. Solid tires? A. Yes, sir.

Q. How much of that road was unpaved at that time—what portions?

A. Why there was about four miles.

Q. From where to where? [102]

A. Era to Canby.

Q. Wasn't there considerable space in 1920 beyond Era that was not paved yet at that time?

A. No.

Q. When you unloaded your goods you always found somebody there to receive them, did you?

A. Sometimes I could find them, sometimes could not without running around over the plant.

Q. There was a night watchman there, was there not? A. Yes, sir.

Q. Well, you succeeded in finding someone? Although you came at night you found someone there to take the goods in, did you? A. Yes, sir.

Q. As soon as you unloaded your goods did you go right away?

(Testimony of J. W. McGee.)

A. I don't just understand you.

Q. Well, I will put that question in another way: Did you remain about the plant there for a while after you unloaded your goods, or did you go away after you got them unloaded?

A. No, I left immediately after I got my signature on them.

Q. This bundle of papers that you presented here represent all the goods that you hauled individually? A. No. No.

Mr. SPENCER.—They represent all of them.

Q. Oh, this represents what you hauled, as well as what the other drivers hauled? A. Yes, sir.

Q. All that these receipts pretended to show was the fact that the Willamette Valley Transfer Company, yourself and the other drivers, had delivered so many of these barrels at that warehouse?

A. Yes, sir. [103]

Q. Did any of those barrels have nail holes driven in them before you left them at the warehouse?

A. No, sir.

Q. I believe you stated that they didn't any of them ferment on the road while you were *bring* them in?

A. Not outside of the ones that were marked that way.

Q. These were— A. Four, I think.

Q. —four.

A. I think I had four that year; either three or four.

(Testimony of J. W. McGee.)

Q. And what was done with them when they came into the warehouse?

A. Well, they just taken them into the warehouse and marked them "Bad order" on the bill.

Witness excused.

Testimony of R. Bailey, for Plaintiff.

R. BAILEY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Mr. Bailey, where do you live?

A. 280 Beech Street.

Q. Here in this city? A. Yes, sir.

Q. And what is your business?

A. Truck driver.

Q. Were you employed as a truck driver in the loganberry season of July and August, 1920?

A. Yes, sir.

Q. And did you haul—drive a truck for the Wil-lamette Valley Transfer Company from Salem to Portland that year? A. I did.

Q. Did you haul barrels of loganberries for H. A. Baker from his [104] packing plant in Salem to the cold-storage plant at Portland? A. Yes, sir.

Q. What kind of a truck did you operate?

A. Operated a Fageo.

Q. And how was that truck equipped as to being covered? A. Iron sides.

Q. What was over the top?

(Testimony of R. Bailey.)

A. Canvas.

Q. Did you operate a trailer at any time with your truck? A. Yes, sir.

Q. How was the trailer equipped as to being covered?

A. The trailer had canvas top and canvas sides.

Q. And when you loaded the barrels of loganberries on your truck, will you state whether or not the barrels were covered so that if they were hauled in the day when the sun was shining they were in the shade? A. They was.

Q. When did you usually make those trips with the trucks? A. In the evening.

Q. And during that season of 1920 about what was your average time between Salem and the cold-storage plant at Portland?

A. Between three and a half and four hours.

Q. Did you always haul the same number of barrels? A. Not always; no, sir.

Q. Well, how did you—what determined the number of barrels that you should take?

A. Why, as many as we could haul, or as many as they had there at the time we left.

Q. And how many trips a day would you make?

A. One.

Q. One trip. There was no speed limit against you that year? A. No, sir. [105]

Q. Now, when you got down to Portland you made deliveries to the cold-storage plant, did you, of these barrels? A. I did.

(Testimony of R. Bailey.)

Q. And what was done when you made deliveries of the barrels? A. Just what do you mean?

Q. Well, did you get any receipt for them?

A. Yes, sir.

Q. I will hand you Plaintiff's Exhibit 1 for Identification, and ask you to state whether or not you identify that package of papers--part of them, at least, as covering barrels that you delivered?

A. Yes, sir; I do.

Q. And state whether or not it was the practice during the entire season of 1920, when you would deliver barrels, for you to take up a receipt of that kind?

A. Why, we had a receipt like this when we delivered barrels in there; we had them O. K. them that way after they were marked.

Q. And the receipt showed the number of barrels, did it? A. Yes, sir.

Q. And the date? A. Yes, sir.

Q. And who gave you the receipts from the cold-storage plant?

A. This Mr. Horne, I think, here.

Q. Well, whoever was in charge there?

A. Yes, whoever was in charge there when we delivered the berries.

Q. What was the practice during that season, so far as you were concerned, as to their noting on the receipts any bad order barrels?

A. They signed for all poor order barrels we delivered there.

(Testimony of R. Bailey.)

Q. Did you have any bad order barrels there yourself?

A. I think it was three that I delivered there in bad order.

Q. And what, Mr. Bailey, have you to say as to whether or not the barrels you delivered there in that season of 1920 were sizzling [106] and bursting and fermenting and juice running out of the top, except for the three you have mentioned.

A. There was none of the others at all.

Q. Who unloaded the barrels from the trucks?

A. I did myself.

Q. And did you have the opportunity to see the tops of the barrels? A. I did, you bet.

Q. You think that you would have discovered any such condition if they had been bubbling and sizzling and bursting? A. I think I would.

Q. Did you ever go there with a truckload of barrels, or a load of barrels and find that there were still barrels in that aisle that had not been placed on the ice or in the ice room?

A. Yes, sir.

Mr. SPENCER.—Cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

What kind of truck do you drive, Mr. Bailey?

A. Fageol.

Q. What kind of wheels, solid tires?

A. Yes, sir.

Q. You made an average of about three miles

(Testimony of R. Bailey.)

and a half an hour—you would make an average of fifteen miles and a half from Salem to Portland?

A. An hour, yes. If they had given me a chance I would make it in twenty-five.

Q. Would those trucks go twenty-five miles an hour? A. Yes, they would go forty.

Q. What was the reason for that speed?

A. Get them here in a hurry.

Q. You were told to?

A. Not exactly. We were told to get them here as quick as we could. [107]

Q. You went over some rough ground?

A. Yes, and I went over pavement.

Q. You went over rough ground? A. Yes.

Q. How fast would you go over that?

A. Just as fast as we could without hurting ourselves—without hurting the truck.

Q. Those berries got a pretty good churning before they got up here, didn't they?

A. Well, not to speak of.

Q. How many other trucks were there besides yours?

A. I think there were four—three or four.

Q. Sometimes some of the other fellows came in ahead of you, did they? A. Yes, sir.

Q. And when they would unload, drive out of the way, you would come in and unload and drive out of the way?

A. There was never nobody ahead of me when I got there.

(Testimony of R. Bailey.)

Q. They were all started along somewhere about the same time?

A. All along between six and seven.

Q. Six and seven o'clock?

A. Yes, and eight.

Q. And those who went ahead of you naturally unloaded before you? A. Yes.

Q. And they unloaded all at the same place, did they? A. They did.

Q. Put them in the aisle there? A. Yes.

Q. So those that got in ahead there had some barrels in the aisle before you got them put in the storage?

A. There was plenty of time for them to get the barrels in the storeroom before any of the other drivers got there, if they had done that.

Q. How do you know?

A. Because there was plenty of time between times. It doesn't take [108] two or three hours.

Q. You say all started in an hour of each other?

A. I say an hour or two hours; there was very seldom over two of us.

Q. Then the barrels could not have laid in the aisle over two hours after they got there until you got there?

A. Yes, two to three. There might have been a difference in our running time from Salem?

Q. Explain to the jury, now, if these people started an hour ahead of you, and you all traveled about the same rate of speed—

(Testimony of R. Bailey.)

A. No, not all.

Q. Explain to the jury how it is that those berries could be in the aisle some two or three hours before you got there?

A. Well, there was a man, I might start ahead of one of the other fellows and make it quicker than he did; I might make three hours and he in four.

Q. Did you ever pass any of the other boys on the road? A. No, sir.

Q. Did any of them ever pass you?

A. No, sir.

Q. Did you notice any nail holes driven in any of the barrels? A. There was none.

Q. Did you drive any of them yourself in them?

A. I did not.

Q. Were you instructed to drive nail holes in the barrels if they were in distress?

A. No, sir.

Q. Did you hear any of them sizzling or fermenting?

A. No, but what they signed for over there in bad order.

Mr. BOOTHE.—That is all.

Witness excused. [109]

Testimony of George Bauer, for Plaintiff.

GEORGE BAUER, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Where do you live, George?

A. 870 Mallory Avenue, city.

Q. And what were you doing in the months of July and August, 1920?

A. Driving truck of the Willamette Valley Transfer.

Q. Did you haul loganberry barrels for Mr. Baker from Salem to the cold-storage plant here?

A. Yes, sir.

Q. What kind of a truck did you drive?

A. Fageol.

Q. How big a truck is that?

A. Three and a half tons.

Q. Did you sometimes have a trailer?

A. Yes, sir.

Q. And how were your truck and trailer equipped as to covering?

A. Sheet iron sides and canvas top and canvas tail piece.

Q. When would you generally make the trips from Salem to town?

A. Most of the times in the evening.

Q. About what was your running time that summer of 1920 between Salem and Portland for those?

(Testimony of George Bauer.)

A. Between three and a half and four hours.

Q. Did you maintain a fairly regular schedule of time? A. Yes, sir.

Q. The Willamette Valley Transfer Company, what is that? Does it do a general trucking business?

A. That is our regular business, freighting business between Portland and Salem—freight service.

Q. Now, did you get receipts for barrels when you brought them to the cold-storage plant at Salem? [110] A. Yes, sir.

Q. And I will ask you to have a look at Plaintiff's Exhibit for Identification 1 and state whether or not the receipts that you got were of that type and whether or not you recognize those receipts—part of them, which you were given in that season? A. Yes, sir, these are some of the receipts.

Q. And what was the practice, so far as you were concerned, with respect to noting on the receipt the bad order, condition of barrels, whenever they were received?

A. Whenever there was any barrels in bad order used to mark it on the receipt, the one that he signed, so many barrels in bad order.

Q. Do you remember now whether you had any bad order barrels, and, if so, how many?

A. I think I had one bad order barrel that season.

Q. Did you have occasion to see the tops of the barrels when you unloaded them? A. Yes, sir.

Q. Were they sizzling or fermenting?

(Testimony of George Bauer.)

A. I never had one—yes, I did, I had one barrel that was fermenting, and just the one.

Q. That is the one you have mentioned?

A. Yes, sir.

Q. So far as you observed were the barrels in the same—except for the one—general condition when you got them down here as they were when you left Salem? A. Yes, sir.

Mr. SPENCER.—Cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

You understand about fifty-two miles you hauled the berries? [111] A. Yes, sir.

Q. What do you remember as to the number of miles that were not paved at that time?

A. Why there was four miles that was not paved.

Q. Four miles. How many barrels did you say came to the plant that you hauled that were fermenting? A. I had one bad order barrel.

Q. One? A. One bad order barrel.

Q. Do you know whether or not one of those trucks ran off into a ditch at some time while you were hauling there and was in the ditch about thirty-six hours? A. Not that season.

Q. Not that season? A. Not that season.

Q. When was it?

A. I don't think that has anything to do with this case at all.

Q. You say there were none of them in the ditch this season? A. There was not.

(Testimony of George Bauer.)

Q. Can you remember how many loads you hauled? A. I do not.

Q. You always found somebody there to receive the berries, did you?

A. We always had to look for somebody, yes.

Q. You expected to do that, didn't you, coming in at night? A. I don't think so.

Q. You don't expect to find a man standing right there from ten to eleven o'clock at night, looking for you, do you?

A. There was supposed to be a man there that night to receive the berries when they came in.

Q. Well, he did do it, he received them?

A. Yes, sir.

Q. And you unloaded them and he took charge of them? [112] A. Yes, sir.

Q. You unloaded and went right away, did you?

A. Yes.

Q. You don't know whether he left them there all night in the aisle, or not, do you?

A. That made no difference to me, as soon as he signed for them.

Q. Whenever he signed for them you got out of the way? A. Sure.

Redirect Examination.

Q. This truck counsel asked you about, do you know when that truck did go off the grade?

A. That was the summer before that.

Q. Summer of 1918? A. Yes.

Q. Do you know whose truck that was?

A. Willamette Valley.

(Testimony of George Bauer.)

Q. Was there any truck went over the grade in 1920? A. No, sir.

Recross-examination.

Q. Those barrels were numbered, were they?

A. Yes, sir.

Q. In consecutive order, I understood the cooper to say, or Mr. Ireland to say—they were numbered from one on up? A. They were.

Q. That is right, is it? A. Yes, sir.

Q. You didn't pay much attention to that number? A. I didn't pay any attention.

Q. But you know they were all numbered in that manner? A. Yes, sir.

JUROR.—I would like to ask a question: What caused that barrel to ferment? [113]

A. What caused that barrel to ferment?

JUROR.—Yes.

A. I don't know anything about that. All I was interested in was the hauling of it. I didn't pay any attention to the fermenting of it.

Mr. SPENCER.—You are not a berryman?

A. I am not a berryman. I am a truck driver.

JUROR.—I would like to ask one question: The size of those barrels.

A. The size of them? They stand about three feet high and they are a foot and a half wide, I think; they are fifty gallon barrels.

Witness excused.

Testimony of L. Hicks, for Plaintiff.

L. HICKS, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Mr. Hicks, what is your business?

A. Truck driver.

Q. And were you employed as a truck driver in the summer of 1920? A. Yes, sir.

Q. Hauling barrels from Salem to Portland?

A. Yes, sir.

Q. Barrels of the kind we have been talking about here? A. Yes, sir.

Q. And were your trucks equipped about the same way with the other boys?

A. Mine had canvas sides and canvas top.

Q. Did you have a trailer? A. Yes, sir.

Q. What sort of time did you make in that season of 1920? [114]

A. Three hours and a half to four hours.

Q. You drive a truck now, do you? A. Yes.

Q. Do you drive on that road now?

A. Yes, sir.

Q. Now, when you got down here to the cold-storage plant did you get receipts for the deliveries that you made? A. Yes, sir.

Q. And will you state whether or not you identify Plaintiff's Exhibit 1 for Identification as including the receipts which came to you?

A. Yes, sir.

(Testimony of L. Hicks.)

Q. What, Mr. Hicks, have you to say as to the practice there at the time of noting on the receipts bad order barrels when they were received?

A. They wrote "Bad order" on the receipt.

Q. Do you remember whether or not you had bad order barrels?

A. No, sir, I did not, not that year I didn't.

Q. Did you observe any barrels that you delivered there spewing and sizzling or fermenting?

A. No, sir.

Q. Heads blowing out? A. No, sir.

Q. Did you notice any nail holes in any barrels?

A. There was no nail holes.

Q. While they were in your possession.

A. If there was nail holes they drove them after I was gone.

Q. I mean any there while you had charge of them? A. No, sir.

Q. You got these barrels of berries, as I understand you, Mr. Hicks, from the packing plant of Mr. Baker at Salem? A. Yes, sir.

Mr. SPENCER.—You may cross-examine.

Cross-examination. [115]

(Questions by Mr. BOOTHE.)

Did you notice whether or not the barrels were numbered? A. They are all numbered.

Q. Consecutively, as the other witness testified?

A. Yes, sir; the weights and number of the barrel and the—

Q. About what time did you start from Salem?

(Testimony of L. Hicks.)

A. I left all the way from six to nine o'clock at night, and some nights were later than that. All depends on how late they worked.

Q. Did you ever pass any of the other drivers?

A. No, sir.

Q. Did any of the other drivers pass you?

A. No, sir.

Q. Did you know of any of them ever passing another? A. No, sir.

Q. Your tires were hard rubber tires?

A. Solid tires.

Q. Solid tires. That is all.

Witness excused.

Mr. SPENCER.—If your Honor please, I will offer in evidence the receipts marked Plaintiff's Exhibit 1 for Identification.

Mr. BOOTHE.—No objection.

(Receipts received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. SPENCER.—I suppose it may be understood that reference may be made to the receipts at the time of the argument without reading them?

COURT.—Yes.

Testimony of N. H. Kelly, for Plaintiff.

N. H. KELLY, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows: [116]

Direct Examination.

(Questions by Mr. SPENCER.)

Where do you live, Mr. Kelly?

(Testimony of N. H. Kelly.)

A. I live in Sumner, Washington, at present.

Q. Are you employed by Mr. H. A. Baker?

A. I am.

Q. In what capacity? A. As bookkeeper.

Q. Have charge of his office there?

A. Yes, sir.

Q. Were you there in that capacity and in charge of the office of Mr. Baker in the summer of 1920?

A. I was.

Q. During the months of July and August?

A. Yes.

Q. You may state, Mr. Kelly, whether or not, during that loganberry season of July and August, 1920, whether you received in due course of mail, beginning along the first of July and continuing to the end of the loganberry season, receipts for loganberries stored by Mr. Baker with the National Cold Storage and Ice Company at Portland—loganberries coming from the packing plant at Salem, Oregon; warehouse receipts? A. Yes, sir, I did.

Q. I hand you a package of receipts marked Plaintiff's Exhibit 2 for Identification, and ask you to state whether or not you recognize those papers as the receipts which came to you by mail day by day during that loganberry season of 1920?

A. Yes, sir; these were mailed to our office.

Q. And when you got them you took them and placed them on file? A. Yes, sir.

Q. And kept them?

A. I filed them as they came. [117]

(Testimony of N. H. Kelly.)

Q. And state whether or not those receipts purport to cover the entire quantity of barrels of loganberries stored by Mr. Baker with the cold-storage people during that season of July and August.

A. Yes, these are supposed to cover the berries.

Q. At any rate you received those from the cold-storage people by mail?

A. Yes, these came through the mail to our office.

Q. And are they in the same form now as when received by you? A. Yes, sir; they are.

Mr. SPENCER.—I will offer those in evidence.

(Receipts received in evidence and marked Plaintiff's Exhibit 2.)

Mr. SPENCER.—I would like to read one of them to the jury as we go along. For example, I will—the first one covers two barrels of strawberries and three barrels of loganberries. I will read the second one, which is just loganberries. Headed National Cold Storage & Ice Co. Duplicate. 309 East Washington Street. There is a number. 7-7-20. That is July 7, 1920. Received of H. A. Baker 1 bbl. Loganberries. Lot Number 8824. Signed by Joe somebody down there; I can't make that out. Some are signed Patton and some with somebody else. On the back of the receipt is stamped this language: "The National Cold Storage & Ice Company shall be liable for any loss thereof or damage thereto of any property in its possession herein described except as hereinafter provided. The National Cold Storage & Ice Company shall not be liable for any loss thereof or damage thereto

(Testimony of N. H. Kelly.)

caused by the act of God, fire, rats or other animals, insects or the elements, same to be removed to or from fire or flood at owner's risk and expense or for differences in weights of commodities caused by natural shrinkage or discrepancies in warehouse weights or count. Claims for loss or damage must be made in writing to the National Cold Storage & Ice Company within forty-eight hours after delivery of the property. Unless claims are so made the National Cold Storage & Ice Company shall [118] not be liable. The National Cold Storage & Ice Company shall have the full benefit of any insurance that may have been effected upon said property caused by loss or damage." And that same thing is stamped on every receipt in the package. You may cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

Did you have an office in Tacoma at the time you received these goods? A. Yes, sir.

Q. What was the number of your office there—Baker's office? A. It was 322 Tacoma Building.

Q. What was it?

A. It was in the Tacoma Building; I think the number was 322.

Q. Who sent those receipts to you?

A. Why, they came from the Cold Storage Company, National Ice and Cold Storage Company.

Q. From the defendant. Were you in the employ of Mr. Baker during the whole season of 1920, summer of 1920, we will say? A. Yes, sir, I was.

(Testimony of N. H. Kelly.)

Q. How long were you in his employ after that?

A. Up until the present time.

Q. You still keep your office at that same place?

A. No, we now have them at Sumner.

Q. How long did you occupy your office at that building, 322 Tacoma Building?

A. Why, it was along in October of 1920, when we left them.

Q. Any mail that was sent to that office after that time was forwarded to you, was it, to Sumner?

A. Yes, sir.

Q. The defendants not only sent those receipts to you, but they sent statements of storage to you, too, did they? [119]

A. They did up until about the time that they stopped sending statements; in other words, up until about the time or shortly after the time that all the barrels were in storage.

Q. After the time of what?

A. That all of them had been put in storage; in other words, they ceased sending statements after that.

Q. Sent statements of the amount due for each month's storage, is that it?

A. Why, they sent along invoices covering storage on the different lots as they had taken them in there and at the end of the month made a regular statement showing the invoices thereon and the amounts.

Q. They sent them right along each month?

(Testimony of N. H. Kelly.)

A. Up until October or November of that year and thereafter I didn't receive any.

Q. Of that year, you say? A. Yes, sir.

Q. Didn't they send them on up until September, 1921? A. I didn't receive them if they did.

Q. Did you answer any of those you did receive?

A. Sir?

Q. Did you answer any of those that you did receive?

A. Well, there wasn't any answer required; we simply ignored them.

Q. Did you pay for them or remit the amount due?

A. Why, the balance ran along there, I don't recall whether we made any remittances on account or not. We were in the habit of making remittances in covering any of our bills.

Q. Are you in the employ of Mr. Baker at the present time? A. I am.

Mr. BOOTHE.—I think that is all.

Witness excused.

Testimony of J. L. Van Doran, for Plaintiff.

J. L. VAN DORAN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows: [120]

Direct Examination.

(Questions by Mr. SPENCER.)

Mr. Van Doran, where do you live?

A. Salem, Oregon.

Q. And how long have you lived there?

(Testimony of J. L. Van Doran.)

A. Six years.

Q. What connection do you have with Mr. Baker's packing plant and loganberry business there?

A. Why, I was in charge of it.

Q. And was that true in the season of 1920?

A. Yes, sir.

Q. What did your duties consist of there, Mr. Van Doran? A. Managing the plant.

Q. How much experience have you had with reference to the loganberry business?

A. Why, I have been packing there at Salem for five or six years and before that I packed berries in California.

Q. Mr. Baker has been in the business of packing loganberries and fruits in the Willamette Valley for how long?

A. Why, about five or six years in the Willamette Valley.

Q. And when I say packing fruits—when you say packing fruits, do you mean packing in barrels in the same general way that has been described here?

A. Yes, sir.

Q. As going on in the season of 1920?

A. Yes, sir.

Q. Do you know how long that business has been a substantial business, generally, of packing berries in barrels generally, in the way described here?

A. Why, I would say—I think Mr. Baker was packing berries in barrels that way since 1910 or

(Testimony of J. L. Van Doran.)

Q. You have known of him having done that since that time? A. Yes, sir.

Q. Now, this loganberry season of 1920 began, as I understood it, about July, picking of the berries began along about the first of July? A. Yes, sir.

Q. And your work about the plant at Salem, what did that bring you in contact with? Did you have occasion to see the work going on in the yards?

A. Yes, sir.

Q. How often would you be out among the yards?

A. Why, probably every few days I would run out to see how they were getting along, see the condition of the berries.

Q. And what have you to say as to the time consumed in getting the berries in from the growers into the packing plant—from the growers' yards? Was it two or three days or the same day? What time was consumed?

A. It was the same day, and generally very shortly after they were picked; probably a few hours.

Q. Who provided the service there?

A. Mr. Baker.

Q. And what was the reason for Mr. Baker providing his own truck service gathering up the berries from the growers?

A. To get them in fresh and firm and put up a good pack of fruit.

Q. Was there any particular demand for loganberries that year?

A. A very great demand for them.

(Testimony of J. L. Van Doran.)

Q. Now, when the berries came into the packing plant, do you have occasion to observe their condition? A. Yes, sir.

Q. And what would you say as to the condition of the berries that year, as to whether they were firm or overripe, or what?

A. Why, they were some of the best berries that I have ever seen; they were firm, good, solid berries.

Q. Was there any condition of decay or fermentation or moulding or [122] anything that would tend, as far as you were concerned, to deteriorate the berries? A. No, sir.

Q. Are you quite familiar with the canning that was done by Mr. Kurtz up there? A. Yes, sir.

Q. In a plant near by? A. Yes, sir.

Q. Just what work was done by him there in the way of canning?

A. Why, he was canning fruits, loganberries and different other fruits there during the—well, practically all of the season.

Q. Do you know where he got his berries, a large part of them? A. Yes, sir.

Q. Where?

A. At and around and about Salem.

Q. How did he get them into his plant?

A. Growers brought them in.

Q. He didn't afford the same service in gathering them up as you did? A. No, sir.

Q. And in canning the berries there what was the fact as to whether or not in operating his can-

(Testimony of J. L. Van Doran.)

ning plant he could keep up with the incoming berries? A. Why, he—just how do you mean?

Q. There has been some testimony here, some talk here about some canning of berries in Kurtz's factory that blew up and fermented; I am asking you whether or not you observed whether or not Kurtz kept up with the canning of the berries.

Mr. BOOTHE.—If the Court please, I am not asking about anything of Kurtz. What I was asking about, was what Mr. Baker was doing there, if he was canning goods. I don't care anything about Kurtz and I object to any testimony about his business. All I want to know is what Mr. Baker was doing there.

Mr. SPENCER.—I submit, your Honor, as a matter of fact counsel [123] has confused the Kurtz berries with the Baker berries, and I simply want to show that Kurtz was canning near by and if he had fermenting berries it wasn't any fault of Baker.

COURT.—He may answer.

A. He was sometimes back in arrears of the amount of fruit that was coming in, but I think probably the cause of the trouble he had with his cans was due to the fact that he had an inexperienced canner; then, to start with, a very antiquated machinery and also that they got confused in the tops of the cans that were put in. That is where the trouble came from there.

Q. Now, Mr. Van Doran, something has been *same* here about whether or not ice was added, ice

(Testimony of J. L. Van Doran.)

was put into the barrels of loganberries handled by you in 1920, the Baker barrels. What is the fact about that?

A. There was no ice put into the barrels.

Q. Had ice ever been put into the barrels?

A. Several years ago we put ice into the barrels. That was in order to meet competition with the other people that packed fruit in barrels. They could buy ice at a much lower price.

Q. You have got to talk loud.

A. We put ice into the barrels in previous years.

Q. By "previous years" what years do you mean?

A. Before 1919. 1918 put ice into the barrels, but not after that.

Q. What was the reason for putting the ice in the barrels?

A. The reason that the ice was put into the barrels was because it could be bought for about five dollars a ton, where we were paying a great deal more than that for the berries, and our competitors started putting ice, chipped ice, into the barrels, and they would sell it all as fruit, see, and they would be paying a great deal less for the ice. Then the Government came along and said, "If you are going to put ice in the barrels you will have to label it as such, in order [124] that the purchasers of this stuff are not paying for three or four—whatever times it was—as much for the ice as they do for the berries"; and as a matter of fact, now,—I mean by experience, the ice is superfluous in so far

(Testimony of J. L. Van Doran.)

as preserving the berries, so we discontinued it in 1918.

Q. 1918? A. That was the last year.

Q. That was the last year you used it?

A. Yes, sir.

Q. And you haven't used ices in barrels since?

A. No, sir.

Q. Do you know what the fact is as to the general condition of the trade, other packers; do they use ice in barrels now? A. No, sir.

Q. Now, Mr. Van Doran, you have had some experience, have you, in handling berries from the field into the packing plant? A. Yes, sir.

Q. In addition to this experience in 1920.

A. Yes, sir.

Q. What would be the average time from the picking of the berries until they got into the packing plants and went into the barrels?

A. Why, the average time I would say would not exceed four or five hours. It would not—in no case would it exceed over twelve hours.

Q. And then what is the fact as to whether or not the barrels were gathered up and brought to Portland as soon as they were available?

A. Yes, the barrels were brought to Portland as soon as they were packed; immediately.

Q. What would you say was the average time from the moment the berries were picked until they got into the cold-storage plant or were delivered to the cold-storage plant at Portland?

A. I don't think the average time would average

(Testimony of J. L. Van Doran.)

twenty-four hours; I would say it didn't exceed twenty-four hours.

Q. Have you had any experience in handling loganberries or similar [125] fruits that are subject to the same natural causes—experience of handling fruits for a greater length of time than twenty-four hours? A. Yes, sir.

Q. What experience have you had in that respect?

A. In 1917 I packed fruit in Lincoln County, at Toledo, Oregon, and railroad facilities there were very poor and lots of time I would pack fruit that probably two days would elapse.

JUROR.—Speak louder.

A. In 1917 we packed berries in Toledo, Oregon, which is over on the coast and the railroad facilities were very poor over there and these berries, blackberries, were raised by homesteaders and people away out in the country out there, the timber, and they were very long delayed in getting them in to us down there, probably a day or possibly two days and from there they were packed and shipped way to Portland by train from there, which meant they had to be shipped either to Albany or Corvallis and then transferred and then up to Portland and I had no trouble with those berries. I imagine those were sometimes as much as two or three or four days, probably, old, before they got in there.

Q. Were those berries stored with the Reids, the National Cold-Storage people? A. Yes, sir.

Q. When you began to ship berries, barrels of

(Testimony of J. L. Van Doran.)

berries from the packing plant to Portland, to the cold-storage people, after you began that work in July, when, do you recall, when did you first come down and go over to the cold-storage plant in Portland and have a look at the barrels then in storage?

A. Why I came down—it was a practice of ours to come down before the season started, to arrange for taking care of these barrels, and after the season started I cannot remember any particular date that I was down until the latter part of July; I think it was around the thirtieth or thirty-first of July was the first time that I remember [126] the exact date that I went in there.

Q. And who were you with at that time?

A. Mr. Baker.

Q. Did you go down into the storage-room?

A. Yes, sir.

Q. Where was the storage-room?

A. The storage-room was on the—well, it was in the basement.

Q. Is that the room that has been described as being equipped with overhead pipes? A. Yes, sir.

Q. Do you remember how that room was equipped, from that trip or any subsequent trip, how it was equipped as having thermometers in it? What kind of thermometers did it have?

A. It had two ordinary, cheap tin thermometers that you use around the house; maybe a little larger.

Q. Are you familiar with the kind of thermometers that are generally used in cold-storage

(Testimony of J. L. Van Doran.)

rooms that register the temperature throughout the day? A. Yes, sir.

Q. And how are they equipped, what do they do?

A. They are a sort of an instrument about that large, that has a little arm on it, and that arm has got red ink on it and all during the day it marks, varies back and forth, whatever the temperature happens to be and marks with this ink on a piece of paper and that is taken away and filed, so that it is an absolute record of the exact temperature at all times during the day. That is the general equipment in all of the other cold storages that I know about.

Q. When you were there in the latter part—you say about the thirty-first of July of 1920, with Mr. Baker, did you observe the condition of the barrels in the cold-storage room at that time?

A. Yes, sir. [127]

Q. And how did you find the barrels at that time?

A. The barrels at that time were in good condition.

Q. Were there any sizzling barrels down there in the cold-storage room on the thirty-first of July?

A. No, sir.

Q. Or any that were blowing the heads?

A. No, sir.

Q. Any oozing of juice out of the barrels?

A. No, the barrels were in good condition. There was practically no stain on them; they were all clean and white.

(Testimony of J. L. Van Doran.)

Q. About how many barrels were there there at that time, on the thirty-first of July?

A. Well, I could not say, really; I think there was about probably around nine hundred or a thousand barrels, offhand; of course I am not sure. Quite a lot of them.

Q. And how long were you there on that trip, do you remember?

A. Why, no, I don't remember; a short time; went through the plant.

Q. Now, if you recall, when did you next hear from the cold-storage people about the subject of barrels down there?

A. About the middle of August; about two weeks later, I think.

Q. As I understand it, in the meantime, following the thirty-first of July and on through the first two weeks of August at least the deliveries kept going from your packing plant on down to the cold-storage plant? A. Yes, sir.

Q. And your deliveries of barrels ended what time, from the packing plant?

A. I think about the sixteenth or seventeenth or eighteenth of August.

Q. The last receipt issued to the Willamette Valley Transfer Company covers one barrel on August eighteenth; is that according to your recollection?

[128]

A. That is the last, yes, sir.

Q. And you say about the middle, or some time in

(Testimony of J. L. Van Doran.)

August you had further word then from the cold-storage people; what was that?

A. I understood that barrels were in a distressed condition and I went up to inspect them.

Q. When did you go down the next time, then, to look at the barrels?

A. That was about the middle of August, fifteenth or sixteenth, I believe.

Q. And you came to Portland? A. Yes, sir.

Q. Who was with you? A. Why, Mr. Ireland.

Q. That is Mr. Ireland that testified here yesterday and this morning?

A. Yes, sir; and another man I had to help.

Q. What did you find down there, now, on that trip, as to the temperature, first of all, the temperature in the room where the barrels were?

A. I looked at the thermometer when I first went in there, saw that the pipes were unfrosted and that the general condition of the barrels was in a terribly bad shape. I looked at the thermometer, and it registered thirty-six, which of course was too high to preserve that stuff, and then the barrels had blown and the juice and fruit was all over the floors and the heads were bursted in and in a general bad condition all the way through.

Q. And did you notice any nail holes in the barrels themselves? A. Yes, sir.

Q. Now, on this trip in August, on the thirty-first of July, were there any nail holes in the barrels then? A. No, sir.

Q. And how general was this condition of nail

(Testimony of J. L. Van Doran.)

holes when you were there on the sixteenth of August? A. Why, apparently every one. [129]

Q. Had you directed anybody to put nail holes in the barrels? A. No, sir.

Q. How general, now, would you say, was this condition of heads blown and barrels oozing their contents out through the top?

A. Well, I re-coopered fifty-four barrels that day and there was still more than that. It looked like they all were that way.

Q. You were with Mr. Ireland, were you, the sixteenth and seventeenth? A. Yes, sir.

Q. And now what, again, what was the condition of the pipes as to their being frosted when you first went there on the sixteenth?

A. There was no frost on them at all.

Q. And when the room is frozen, or the brine or juice is on the pipes, does that create frosting on the pipes?

A. Yes, sir; and at that time I asked the people in charge of the cold-storage place what was the reason there wasn't—a reason that there was a temperature there and they told me it was very hot and that they had to make ice and they had to switch their juice, as they call it, over into their ice-making machines in order to keep up the ice for icing cars, the commercial end of the ice.

JUROR.—A little louder, please.

A. I say, at that time I asked the people in charge of the cold storage the reason that these pipes were not frosted and we didn't have temperature that

(Testimony of J. L. Van Doran.)

would hold the stuff. They said they had a contract for ice and that they had to take the ammonia or juice, what they call it, over into their ice-making machinery in order to make enough ice to keep up with their contracts and they were loading out ice and loading it into cars at that very time.

Q. Did you notice any appreciable change in the temperature of the room while you were there on those two days?

A. Not those two days; there may have been a little, but it wasn't very much. [130]

Q. Were you down there after that?

A. Yes, sir.

Q. When was the next time?

A. I think it was, if I remember rightly, it was on a Saturday when I left and the first week—I was down Sunday and I stayed down, I was there, I think, every day for three or four or five days until the temperature was on again.

Q. Just as soon as you saw what was the situation down there what did you do with respect to advising Mr. Baker? A. I wired him immediately.

Q. He was then at what place?

A. I wired him at Sumner, Washington,—yes, Sumner, Washington.

Q. And of course you don't know what took place between Mr. Baker and the cold-storage people; that didn't pass through your hands.

A. Mr. Baker wired me to watch it every day until it was right.

Q. You say the next time you were down there

(Testimony of J. L. Van Doran.)

was the week following. Well, did you get any appreciable change in the temperature then, and if so, how soon?

A. Well, probably before I left the temperature was down to about—

Q. Down to what?

A. It was down to twenty-four or twenty-five after I stayed there for a few days.

Q. How long were you there, do you know?

A. I think it was on a Thursday or Friday, the first time I went up there, and then about Wednesday or Thursday, possibly Friday of the next week it was down to about twenty-four or five. I am not sure as to the exact day, but I think that is pretty close to it.

Mr. SPENCER.—You may cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

Are you related to Mr. Baker in any way? [131]

A. Yes, sir.

Q. What is the relationship?

A. He is my stepfather.

Q. He is your stepfather? A. Yes, sir.

Q. How much of your time did you devote to the business in Salem while you were looking after it up there? A. I devoted all my time.

Q. Were you around that plant much of the time?

A. Yes, sir.

Q. Was Mr. Baker canning berries there at any of that time?

(Testimony of J. L. Van Doran.)

A. He was—had made arrangements with some other people to can berries there at that time, yes.

Q. That was doing that for him? A. Yes, sir.

Q. It was his berries that were being canned?

A. Yes, sir.

Q. Were those the berries that Kurtz was canning? A. No, sir.

Q. Kurtz was doing some of his own canning and Mr. Baker was doing his own canning, is that right?

A. Yes, sir.

Q. Now, the goods that were sent up to the plant there, some were sent to the cannery and some sent to be barreled, is that right? A. Yes, sir.

Q. Isn't it a fact that the best berries were put in the cans? A. No, sir.

Q. When you visited the plant about the thirty-first of July you say everything was all right?

A. Yes, sir, the barrels looked good at that time.

Q. And on about the sixteenth, when you came in, how many were fermenting? [132]

A. Why, I think they all were, more or less. Some of them were worse than others.

Q. You say you think. Are you sure? I would like you to tell something definite to the jury. Were they or were they not all fermenting?

A. Of course as I came in they were piled on top of one another, you see, and the general appearance was that they were all fermenting and all sizzling and bursted. As I got into this, why, I coopered fifty-four barrels, put new heads in that many; I would say that practically every barrel had a hole

(Testimony of J. L. Van Doran.)

through it and was fermenting and sizzling, bubbling.

Q. You say there was about nine hundred or a thousand barrels in the plant at that time?

A. I said there was about the thirty-first of July, there was about that many.

Q. About how many were there, then, on the sixteenth of August? A. There wasn't that many.

Q. About how many?

A. I don't know, really, I could not say, but there wasn't as many as that.

Q. Now, speaking with reference to these three hundred and ninety-eight barrels that are mentioned in the complaint, how many of those barrels, if you know, were fermenting? A. All of them.

Q. You say they were all fermenting?

A. Yes, sir.

Q. Now, those barrels that you re-coopered were some holdovers, were they not, some that were in distress, had been in bad condition? Were a good many of those holdovers barrels? That is that had been accumulating during the season?

A. Why, I suppose they were.

Q. They had been shipping quite a lot of goods and the bad ones they [133] left back, isn't that true?

A. I wasn't there when some of those shipments went out, but the barrels I fixed there of course the heads were entirely blown out.

Q. Didn't Reid send to you before this to come out there and inspect the carloads of goods that

(Testimony of J. L. Van Doran.)

were going out and didn't you come down and do that?

A. I don't remember of doing it that particular year; I have done that though.

Q. Didn't you at any time during this shipping season of 1920 come down to their plant here and inspect the goods and report that they were all right and ready for shipment?

A. I don't remember particularly of going down at that time, but I do know that if the barrels were in bad condition I would go down and put them in as good condition as I could before they went out. That is what I did at that time. The fifty-four barrels I went down to re-cooper were supposed to be shipped out. That is the reason I went down there and fixed them.

Q. You came down to re-cooper those barrels at the request of the defendants here, did you not?

A. Yes, sir.

Q. They wanted you to put them in good condition so that you could make something out of them?

A. I don't know. They may have been sold. I could not tell you about that part of it.

Q. You knew some of them were put into the warehouse in bad condition, did you not?

A. Yes, I did.

Q. And you knew they had to be fixed, or re-coopered, didn't you?

A. Yes, sir. The ones that had been marked on the receipts was the ones. Of course lots of times a barrel will break, and irrespective of fermentation,

(Testimony of J. L. Van Doran.)

in the way of cooperage and handling them; sometimes a barrel gets jarred or rotten, something like that and [134] they would be leaking irrespective of the fact of fermentation. And lots of times I would have to go down there and repair a barrel that the fruit would be in perfect condition and the barrel would be broken, a head might break or something, in transferring it.

Q. You didn't expect the defendants to re-cooper the barrels, did you, that had breaks?

A. He had sometimes done that, yes.

Q. What is that?

A. I didn't expect him to, but lots of times, previous years, if a barrel would happen to be broken or something like that, he might put a head in for us.

JUROR.—May I ask a question?

A. Yes, sir.

JUROR.—When you went on the thirty-first of July with Mr. Baker to inspect the barrels, were any of the cold-storage people present in the basement?

A. As a general rule the foreman of the plant would take us down there and go in with us.

JUROR.—And do you know what the temperature was at that time?

A. No, I could not tell you, but it apparently was what it ought to have been, pretty nearly so, because the frost was on and everything was in good shape at that time, as I could see.

JUROR.—They said that they transferred am-

(Testimony of J. L. Van Doran.)

monia from one place to another; why did they do that? Was there a shortage of ammonia?

A. They were putting in some new machinery, they told me at the time, they didn't have enough machinery to run their entire business there. They told me that they had to make enough ice to fulfill some other contract, or something like that, and that they didn't have enough machinery to run both places; that is the cold storage and the ice machinery, making the ice, and they told me at the time that they were installing some new machinery which they showed to us, and they [135] said that they would switch it back again as soon as they could, as soon as they got this ice, or something like that.

Witness excused.

Testimony of H. A. Baker, in His Own Behalf.

H. A. BAKER, plaintiff herein, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Your name is H. A. Baker?

A. H. A. Baker, yes, sir.

Q. Where do you live, Mr. Baker?

A. Sumner, Washington.

Q. What business have you been engaged in in the past years?

A. Why, principally in the barreled berry, fruit

(Testimony of H. A. Baker.)

business, for the last twelve or fourteen years; in fact, I originated the business.

Q. You started that business?

A. I started the barreled business.

Q. And where did you begin that barreled fruit business?

A. That was started, originated with sour cherries in Colorado.

Q. And then the business expanded to take in other fruits?

A. The business became as staple as eggs or wheat or butter or anything else, and I started out over the country.

Q. How much experience have you had in handling barreled loganberries?

A. Why, I think we have handled barreled loganberries since about 1914, I think we started with loganberries.

Q. And did you, prior to the time you started in in the Willamette Valley, in 1914,—was anybody handling the barreled loganberries there at that time? A. No, not to my knowledge.

Q. And just give us some idea of the extent of the barreled loganberry experience that you have had in the Willamette Valley since that time. [136]

A. I started packing loganberries, I think, about 1914, both in Oregon and in California, and in Washington, and we packed a great many thousands of barrels of loganberries. In fact, we packed, probably, the last ten or twelve years, one hundred thousand barrels of strawberries, rasp-

(Testimony of H. A. Baker.)

berries, loganberries and sour cherries, in different parts of the country and sometimes I have been as far as two hundred or three hundred miles from the cold storage plant.

Q. Will you state, Mr. Baker, whether or not the handling of loganberries and the other fruits that you have mentioned in barrels, packing them in barrels after they are picked and then later getting them into cold storage is a recognized method and business in the handling of fruits?

A. Absolutely is one of the big industries of the United States; in fact, that method of packing fruits has made millions of dollars for the north-west.

Q. Where are most of the loganberries of the country grown?

A. Most of the loganberries are grown in the West here, although quite a few are grown in California and Washington.

Q. Now, in the season of 1920, what, if any, opportunity did you have for observing the condition of the loganberry crop around Salem which you were handling? I mean prior to the time of packing?

A. Why, the condition seemed to be rather favorable that year, if I remember correctly; it looked like a very good crop.

Q. Were you at your packing plant at different times during that season? A. I was; yes, sir.

Q. And did you have occasion to examine the berries?

(Testimony of H. A. Baker.)

A. Yes, I always go through and examine things quite closely when I am visiting the different plants.

Q. And what would you say was the condition, from your inspection of the berries during that season that you saw?

A. They seemed to be in very good condition. I have no criticism to make. The boys were all instructed, if there was any poor fruit of [137] any kind, not to pack them. I don't think they had any, because it is our aim at all times to take care of things promptly and save waste and pack economically.

Q. Your packing plant there was not, as I understand it, connected with a canning plant operated by Mr. Kurtz at the time. Will you explain to the jury about this canning proposition and what, if any, berries, you had canned that year at that place?

A. I had a cannery at Sumner, Washington, and at Sumner, Washington we were a little short of loganberries that year; I had taken some orders for canned loganberries, so I made arrangements with Kurtz for a portion of the season after he had canned his loganberries, to use his help and can some for myself. Later on in the season we found that the help was not competent, that the cans had not been properly sealed, that they may not have used the right temperature, and we did have some trouble over swollen cans that year, but it was not due to the fruit because we shipped those same loganberries from Salem to Sumner and

(Testimony of H. A. Baker.)

packed them there without any difficulty whatever. The trouble was in the canning of the fruit; with the cans; it wasn't in the fruit.

Q. Now, in packing the berries in the barrels, something has been said here about mashing them down. I wish you would explain to the jury just how they are packed in the barrels and what the process is.

A. Why, as far as mashing them down, it does not make any difference at all whether they are mashed at all. A mashed berry will not ferment any quicker, probably, than a whole berry that is exposed to the air. It might depend on the air. If it is moist air the whole berry would probably not ferment, but it would get whiskers, as they call it, quicker than the mashed berry. It is a custom with some packers, my competitors Armour & Company, Armour and Company make it a practice to mash the fruit all up. They think it is better that way. It is a matter of weight. We don't make any claim at all, if it mashes it don't make any difference. The weight itself will mash [138] the meat part of the berries anyway. It doesn't injure them at all, if they are kept at a right temperature.

Q. Now, it has appeared in the testimony thus far, Mr. Baker, that these berries were handled by trucks from your packing plant to the cold-storage plant in Portland. Will you state what is the practice in that respect as to getting them into

(Testimony of H. A. Baker.)

cold-storage plant by trucks and what the advantages are over the disadvantages, if there are any?

A. Why, going back to my early experience in 1909 and 1910 and '11 and '12 and '13, until we got trucks, we had to watch every car that went in. We had very little difficulty, but even so we had to watch it carefully. The railroads are not as reliable as the trucks. The trucks, we can keep a check on them, they are guaranteed to give us service not longer than six hours. They gave us better than that, three and a half to four hours, according to their testimony, but take it with the railroads, I have shipped some from Salem by rail; it was packed, say to-day, it was put on the car to-night, if it was put in cold storage next night we were in luck. And I have shipped at Hammond, Louisiana, which is a hot country, down to New Orleans, a distance of about eighty miles by rail, and if it got in in forty-eight hours we were in pretty good luck, and yet we had very little difficulty. Truck service is infinitely better than the other, the hard tire cuts no figure. The weight of the berries themselves will mash it.

Q. Those were barreled goods you are speaking of? A. Yes, we had no cannery down there.

Q. And prior to the time they got into cold storage? A. Yes.

JUROR.—Can you account for why those few barrels, some of them fermented before they got to Portland?

(Testimony of H. A. Baker.)

A. Why, it is just like packing a bunch of apples here east, a few apples will ferment or rot before they got into cold storage and cooled down. The percentage is small. Now, I have handled as high, in 1919 I packed about a million four hundred thousand dollars worth of barrels. My loss that year was less than one thousand dollars through fermentation, so you can figure for yourself how small the loss is. You can figure from these warehouse receipts. 1630 barrels of [139] loganberries and I don't think there is over ten or eleven barrels arrived in bad condition. Now, if the percentage was high we would have to give up the business, it would not be a successful business. It has made the fruit business, this barreled business has.

Q. Now, Mr. Baker, something has been said, also, in one or two years prior to 1919 of having ice in the barrels. I wish you would explain to the jury how that—first of all, what was the practice, when the barreled business first began, then how did this ice in the barrel practice come in, and if it has been discontinued, why so?

A. When I first commenced barreling I tried out all the fruit, different degrees of shipping, different temperatures, different service, and we never thought of ice. But our competitors started putting ice in the barrel. He may have thought it a good scheme, may have thought it cooled the barrel off, but as a matter of fact it didn't make any difference, but as a matter of competition I had to

(Testimony of H. A. Baker.)

put in ice the same as they did. Take in 1920 we bought ice at five dollars a ton, I forget the exact figure, it may have been six or four. We were paying six cents a pound for loganberries. If our competitors were putting in thirty, forty, fifty pounds of ice, no matter what that may be, and sell the whole as loganberries, we could not meet the competition, we had to do the same thing, and I think it was in about 1918 that the Government found out about it through their inspectors and notified us all we would have to stop or mark it on the barrel, so then we stopped. As soon as the others did we stopped. I don't think anybody used ice. The man who used ice the most and I think probably started the scheme was a man named Mays at Independence. Also I think he was the man used more ice than anybody else, but we had that competition to meet all over the country.

Q. Now, Mr. Baker, coming down to the storage with the National Cold Storage people, you had had some experience in storing with [140] these gentlemen in years prior to 1920?

A. Yes, I think I started storing with the National Ice about 1913. At that time my business was in charge of Mr. Pine, Mr. Lucius Pine, and we instructed them at that time what temperature to carry the fruits, that is about eighteen to twenty-four; that is what they were told; eighteen to twenty-four is very satisfactory providing they can keep the temperature down to that, and we had no claims

(Testimony of H. A. Baker.)

against the Reids; we have done business with them more or less ever since. I think nearly every year.

Q. Did you have occasion to discuss with them this question of temperature in succeeding years after you first began doing business with them?

A. We did have. I think two or three years. It was my custom to notify my cold-storage plants about the temperatures they should carry these goods, until that business is established, they knew what they should keep it at.

Q. So that, as I understand it, beginning with the season of 1920, it is true, is it, that there was no particular conversation about the temperature to be maintained there?

A. It should not have been necessary. They have been carrying our goods for years at proper temperatures and with success; we had had no losses and we never made a claim against them.

Q. Beginning with the season of 1920, what was the rate that they charged you for the storage facilities that year?

A. Why, that year they were charging us \$1.15 a barrel for the first month, supposedly to cover—the previous year they had been charging us, I think, sixty-five cents. That was supposedly an increase to cover freezing. That is when they were expecting to put in additional machinery and put in a freezing-room.

Q. And the charge made against you for the first month, was that [141] at the rate of \$1.15?

A. Yes, sir.

(Testimony of H. A. Baker.)

Q. And you say that fifty cents of that was to cover freezing? A. Yes, sir.

Q. What do you mean by freezing?

A. Why, ordinarily the term, among the cold storage plants, is used where they have a room that will run from one to ten or fifteen above zero. It is where they run—I think the term originated with fish. They will put in fish and freeze it up solid in that freezing-room, and then they will put it in temporarily we will say twenty-seven or twenty-five—some temperature below freezing, and for the first few days they run it through this extremely cold room, freeze it. The freezer, too, I think is used for meats. They will keep meats, I think, in what they call the freezer, this low temperature.

Q. The bills rendered you were at the rate of \$1.15 for the first month, and covered fifty cents for freezing, you say. Were your loganberries frozen in the way you have described that term?

A. No, sir; I think they were intending to get that freezer completed that year.

Q. You were around the plant of the cold storage company?

A. Yes, sir; I was in and out there several times during the season.

Q. And does the freezer-room—is that ordinarily different from the storage-room?

A. Why, the freezer usually contains more pipes. Now, pipes don't include everything. They have got to have compressors and plenty of ammonia forced through their pipes, or they cannot get the

(Testimony of H. A. Baker.)

temperature down, even though they have plenty of pipes, unless they have compressors to pump the ammonia through those pipes, keep that in circulation. If it is ammonia. Sometimes it is brine. There are two or three different systems. Some are [142] ammonia system and some are what they call salt system or brine system.

Q. This cold-storage room of the defendants, how was it equipped in that season of 1920 as to thermometers?

A. I never saw but one thermometer there; it was a common, straight tin thermometer.

Q. Well, do you know of facilities that are available for automatically registering the temperature?

A. Why, the usual cold-storage plants have an automatic thermometer; that is one which has an arm that registers the temperature each hour of the day and those cards, or whatever they may be called, are filed away for reference, showing the temperature that existed during the entire twenty-four hours of that day. And there is a reason for that, because if an employee happens to go to sleep at night and doesn't keep up his temperature it is easily shown on that card, just the same as the time card in the factory.

Q. Now, if you don't have one of those automatic devices, what is the fact as to whether or not a great deal more personal attention is required to be given by the people operating the cold room in watching the old fashioned thermometers?

(Testimony of H. A. Baker.)

A. Why, this is very simple, they can just glance at it and see where the needle is. They take it off every day and put on a new one, whereas with an old thermometer they have to look at it every couple of hours to see whether the room is going up or going down.

Mr. SPENCER.—Mr. Boothe, have you the original letter of July 15 written by Mr. Baker?

Mr. BOOTHE.—Yes.

Q. Mr. Baker, I hand you a letter dated July 15, purporting to have been written by you, and ask you if you identify it? A. I do.

Q. To whom did you write the letter? [143]

A. To the National Ice and Cold Storage Company of Portland, Oregon.

Q. And you wrote it with reference to the attention to be given to these particular goods that you were storing there? A. Yes, sir.

Mr. SPENCER.—I will offer the letter in evidence.

Mr. BOOTHE.—No objection.

Letter received in evidence and marked Plaintiff's Exhibit 3.

Mr. SPENCER.—It is dated July 15, 1920. "Tacoma, Washington. The National Ice & Cold Storage Company, Portland, Oregon. Gentlemen: We are storing barreled goods with you, and wish you would wire this office at any time any of the barrels show distress. Should any of them commence to bulge at the head, take a 6 or 8 penny nail, drive it through the head three or four times,

(Testimony of H. A. Baker.)

withdrawing it and allowing the gas to escape—and at all times notifying me and Van Doran.” Signed “Yours very truly, H. A. Baker.”

Q. What was the occasion for writing that letter, Mr. Baker?

A. Just a matter of precaution. They may have a few barrels and we want to keep in touch with the cold-storage product.

Q. Had you given advice to other cold-storage concerns when you were doing business with them?

Mr. BOOTHE.—I object to that, your Honor, I object to the question.

Mr. SPENCER.—All right, I will withdraw it.

Q. Now, when did you come down to the cold-storage plant after July first, 1920?

A. Why, shortly after this date, I think about the twenty-second or twenty-third, I commenced to order out barreled loganberries to go east. I think I had shipped about two carloads to St. Louis which arrived in good condition. I came down here on the thirty-first of July and went through the barrel room—through the cold [144] storage with Mr. Van Doran and I remarked at that time that I had never seen a lot of barrels in better condition. Absolutely there were very few barrels that were stained and the storage was to be complimented on the condition in which they were at that time.

Q. How was the refrigeration, as far as you could determine?

A. The pipes were thoroughly frosted, showing that the room was cool, and none of the barrels to

(Testimony of H. A. Baker.)

speak of was showing distress, very few, indeed. And I consequently gave orders for further shipments to go east.

Q. You gave orders for further shipments to go east? A. Yes.

Q. Then when did you next hear of the matter of the barrels?

A. I was in Bellingham I think it was about the fourteenth of August, I think, I got a wire from my office in Tacoma, Mr. Kelly—

Q. Well, I don't think it would be proper for you to state what passed between you and Mr. Kelly.

A. I got a wire that the barrels were in bad order. I immediately wired Mr. Van Doran to go to Salem at once and take care of them.

Q. Go to Portland?

A. I mean go to Portland and take care of them.

Q. Then what next happened?

A. Why, I received a wire from Mr. Van Doran, I think it was on the sixteenth.

Q. Of August.

A. Yes, I think we have the wire.

Q. And were you then advised that the temperature—

A. He advised me that the temperature was up to thirty-six.

Mr. SPENCER.—I don't want to lead the witness, I want to get along.

Mr. BOOTHE.—Let him testify, he is here.

Q. You say he advised the temperature was above thirty-six? [145]

(Testimony of H. A. Baker.)

Mr. BOOTHE.—I object, your Honor; let Mr. Van Doran—

Q. Well, all right, what did Mr. Van Doran tell you?

Mr. BOOTHE.—What did he do.

Q. What information about that time did you get as to the temperature; from whom?

Mr. BOOTHE.—I object, your Honor, to information from anybody else besides this defendant.

COURT.—Has it reference to some act on his part?

Mr. SPENCER.—He immediately wired the Cold Storage Company, begging them to get the temperature down.

Mr. BOOTHE.—Let him come to that.

Mr. SPENCER.—Will you produce the telegram of August sixteenth or seventeenth from Mr. Baker to your people?

Mr. BOOTHE.—I think this is the one. The date is not very clear. Look at it and see.

Mr. SPENCER.—That is the one.

Q. I will hand you a telegram, Mr. Baker, which purports to have been sent by you and ask you if you did send that telegram?

A. I did, yes, sir, from Bellingham.

Mr. SPENCER.—I will offer the telegram in evidence.

Mr. BOOTHE.—No objection.

(Telegram received in evidence and marked Plaintiff's Exhibit 4, and read as follows:)

(Testimony of H. A. Baker.)

“Bellingham, Washington, 16. National Cold Storage and Ice Co., Portland, Oregon. Van Doran wires me that temperature of room is up to thirty-six. You know you will be liable for any loss at this temperature. Each barrel is worth about seventy dollars. I beg you to get the temperature down to twenty-six or lower. Will ship out very fast now, but barrels should be cooled to twenty-six before loading. H. A. Baker.”

COURT.—What is the date of that?

Mr. SPENCER.—It says Bellingham, Washington, sixteen. It has August 16, 1920, at the top of the message.

Q. Well, then, what did you do, Mr. Baker, did you come down, or what [146] happened next?

A. As soon as I could get here I came down. I think it was about the twentieth of August. I found the barrels in a most deplorable condition. I never had seen anything like it in my life. There were nail holes in the tops of the barrels and the juice—you could stand there and listen and hear them bubble here and there and the other place and see the juice oozing from the barrel, even over the chimes and out on the floor, enough to make you sick.

Q. And what did you do, if anything—or, rather, what did you observe as to the temperature of the room at that time?

A. The temperature of the room at that time was about thirty-six.

COURT.—About what, did you say?

(Testimony of H. A. Baker.)

A. About thirty-six.

COURT.—That was the twentieth?

A. Yes. Let me see. I think it was a little lower than that. I think it was about thirty-four, if I remember correctly.

Q. And what was the condition of the pipes as to showing complete refrigeration or whether the juice was in the pipes at that time?

A. I think the pipes at that time were partially frosted. They were about half frosted over one-half of the room. I think, if I remember rightly, the room was about—high on one side; one-half of the room was down and the other half of the room was up in temperature.

Q. Well, do I understand you that the pipes were frosted—

A. Frosted about halfway across the room and under the pipes where it was frosted the temperature was down to a lower degree than where it was in the other half of the room, where there was no frosting on the pipes.

Q. Well, what was the condition of the barrels at that time on the—Oh, that was the next visit, you came down on the twentieth?

A. Yes. [147]

Q. What was done, then, if anything, with reference to the barrels? Did you have any conversation with the Reids at that time?

A. Why, yes; I implored them to get the temperature down to save this fruit, if possible. They stated to me at that time that they were doing the

(Testimony of H. A. Baker.)

very best they could, that they had a lot of ice contracts, as I remember it, they had made contracts with the railroads, to furnish ice for re-icing for cars that were coming through Portland, and that they had planned for new machinery and that they had been unable to get this machinery; that they had made contracts for ice and that the ice companies were forcing them for more ice and they had to take the juice off of our room to make this ice. That they didn't have compressor capacity.

Q. Well, now, why didn't you take your loganberries out of the cold storage, out of their premises at that time and take them to some place else?

A. They were in such condition if we had moved them at that time, the air that is in the barrel, they would have blown all over; we would have lost them. The only thing we could do was to implore them to get the temperature down and then, if necessary, get them out. If they had advised me earlier that they were not able to keep the temperature down I could have then run them into Seattle and had no difficulty and it would have only cost me about one dollar a barrel to do it; the freight rate I think was about fifty cents, but after the barrels were fermented the worst thing to do is to move them around.

Q. When were you down here, then, the next time after the twentieth of August?

A. I think I was here about ten days after that, something like the twenty-ninth or thirtieth, it was.

(Testimony of H. A. Baker.)

Q. And what did you find as to the condition of the berries and [148] the room at that time?

A. I found the room, then, they had reversed things, the frosting was on the other side of the room and on this side Mr. Van Doran I think had reported that the thermometer was down. When I came to investigate I found by moving the thermometer from one side of the room to the other side of the room there was a vast difference in the temperature and I found by looking at the pipes they were frosted where the temperature was low, the pipes would be frosted above it. It was a very large room, larger than usual for a cold-storage plant.

Q. Now, what did you do toward attempting to save the product after this fermentation had been evident in it. What I mean is, did you sell it or undertake to ship it?

A. Why, we had then in transit five or six cars, I think four or five cars—five cars, we will say, that had been shipped out between the first of August, and when the difficulty arose, we will say the sixteenth of August. One of the cars that were shipped into Chicago—

Mr. BOOTHE.—Your Honor, I object to that, to this answer, and move to have it stricken out. That has nothing to do with these barrels that are in question. What he had shipped to Chicago had nothing to do with this, these particular goods we are dealing with, these 398 barrels that he says were in cold storage at that time.

(Testimony of H. A. Baker.)

Mr. SPENCER.—The fact of the matter is, your Honor, it is our position in this case that the same treatment was given to all of the barrels as to those that were shipped out prior to about the first of August. I think there were about two cars which went out prior to the first of August. It was after the first of August that the temperature went up to thirty-six degrees and stayed there some time, and it is our notion about it that the same [149] thing happened, substantially, to all of those barrels of berries that were subject to that rise in temperature. My idea about it is that berries that were subjected to that that went east and arrived in bad order are in just the same shape as these are here now in bad order.

COURT.—You are not claiming—

Mr. SPENCER.—We are not claiming any damage for those that went east.

COURT.—They were in there at the same time. He may answer.

Mr. SPENCER.—We are not claiming any damages to those that went east at all, because they were sold to other people.

Mr. BOOTHE.—Note an exception.

A. The car that was shipped to Chicago to one of our buyers about the fourth of August arrived there with about twenty-nine barrels in bad order; it was so reported. Another car that was shipped, I think about four or five days later than that, arrived there with about between fifty and sixty per cent; I understand there was about one hundred

(Testimony of H. A. Baker.)

barrels to a car, ran from ninety-nine to one hundred and five, and the second there was about fifty to sixty per cent that arrived in bad condition. The third car, which went out a few days later than that, probably three or four days, perhaps only two or three days, that time, arrived all in bad condition and all that were shipped arrived after that—between that time and when I stopped them, when I found out the actual condition—arrived in bad order excepting those two cars I have just mentioned, when a portion of that was saved, showing the progress of the fermentation.

Q. You shipped, as I understand your earlier statement, two cars prior to August first?

A. Two cars were shipped to St. Louis, containing one hundred and five barrels each, which arrived in good condition. [150]

Q. No claim was made against you or anybody else as to that? A. No, sir.

Q. But as to the barrels that were in there on August first and were shipped out after that date, or were put in after that date and subsequently shipped out, what is the fact as to whether or not claims have been made against you on account of the fermented condition—bad condition?

Mr. BOOTHE.—I object to that, your Honor. Those goods were shipped a long ways in refrigerator cars, probably three or four weeks reaching their destination.

COURT.—I think it is a circumstance; whatever the jury think it is worth, of course.

(Testimony of H. A. Baker.)

A. Why, most of them arrived in bad condition, excepting these I have just mentioned, the two cars.

Q. Have you had much experience in shipping barrels of loganberries after they have been refrigerated in cold-storage plants to eastern points?

A. I think so; more than any other two people, probably, in the United States.

Q. And your experience as a packer, does it include also the shipping of loganberries to eastern points? A. Yes, sir.

Q. In barrels? A. Yes, sir.

Q. I wish you would give the jury, just in a general way, some idea of the extent of that. You have already stated more than two men, probably. How many barrels do you suppose you have shipped to eastern points?

A. Just a moment, let me think it over. You mean just loganberries.

Q. Yes, loganberries, before these loganberries.

A. I presume I have shipped fifteen to twenty thousand barrels in my experience. [151]

Q. By refrigerator-car shipments?

A. By refrigerator-car system.

Q. And what has been your experience as to encountering loss?

A. I have never lost a barrel in shipping by refrigeration. We have had some loss, but not loganberries, where there was lack of ice, but those are very exceptional. When I say I shipped one hundred thousand barrels in my experience, that would be a thousand cars. We have had occasion to put

(Testimony of H. A. Baker.)

in a claim for three carloads out of that thousand, in my experience, because of lack of ice.

JUROR.—Were these shipped under ice from Portland when they left here? A. What?

JUROR.—Were those under ice when leaving Portland?

A. We sent under ice and under salt. We have them iced and salt the car at every icing station and they add fifteen per cent of salt to the cracked ice. Not only ice, but it has to be cracked ice, and fifteen per cent of salt added. Mind you, the barrels go into these refrigerator-cars, are supposed to go in absolutely cold out of a room that is at least twenty-four degrees temperature.

JUROR.—And they are iced at stations along roads?

A. And then they are iced at all stations along the road. We have never lost, if I remember correctly, I think only lost three cars out of about a thousand cars I have shipped in my experience.

Whereupon recess was taken until June 13, 1922, at two o'clock P. M.

Portland, Oregon, Tuesday, June 13, 1922,

2:00 P. M.

H. A. BAKER, resumes the stand.

Direct Examination (Continued).

(Questions by Mr. SPENCER.)

Mr. Baker, I hand you what purports to be a [152] telegram from the National Cold Storage and Ice Company, and ask you if you identify that?

(Testimony of H. A. Baker.)

A. I do, yes, sir.

Q. What date does it bear?

A. August 21, 1920.

Q. And did you receive that by telegraph?

A. I received that by telegraph at Tacoma.

Mr. SPENCER.—I will offer the telegram in evidence. It is dated August 21.

Mr. BOOTHE.—No objection.

(Telegram received in evidence and marked Plaintiff's Exhibit 5.)

Mr. SPENCER.—This is a telegram dated Portland, Oregon, August 21, 1920. (Reads as follows:) "H. A. Baker, 322 Tacoma Building, Tacoma, Washington. Temperature basement now 27. Bubbling stopped floor clean. Have taken refrigeration off ice tank to do this. Expect 25 degrees to-morrow. National Cold Storage & Ice Co."

Q. Mr. Baker, do you know anything about the fermentation of fruits, particularly loganberries?

A. Why, whenever there is fermentation there has got to be carbonic acid gas formed and whenever there is carbonic acid formed you will find it has got to press somewhere. If there is any fermentation in the barrel it is bound to show at its head by bulging, consequently if there is any trouble anywhere in the way of fermentation, it is going to show in the barrel either through leaking or bulging of the head.

Q. Have you had any experience in chemistry?

A. Yes, sir, I have studied chemistry four years,

(Testimony of H. A. Baker.)

years ago. I used to be in the drug business years ago.

Q. Fermentation of loganberries, what caused fermentation of loganberries? [153]

A. Why, fermentation usually is caused by heat—must be caused by heat. Temperature is too high. If you keep the temperature down there is no trouble; if the temperature goes above freezing usually there is some fermentation.

Q. Do you know what the temperature should be to keep a berry, such as the loganberry, from fermenting?

A. Why, I presume that a little below freezing would keep barreled fruit after they had once been reduced to that temperature in the center of the barrel, but in order to get the heat in the center of the barrel out of it, it ought to be put in a room—I have always directed them, say from sixteen to twenty-six, or eighteen to twenty-four, but after the heat is out of the barrel, why probably twenty-eight or twenty-seven might keep it, but it is too risky. I have always directed them to keep the temperature down to twenty-six and oftentimes I have directed them twenty-four.

Q. What is the effect on barrels of berries which have been put in the refrigeration-room when you are constantly moving in new barrels and storing them with them?

A. Why, naturally the heat that is in the new barrels, usually the berries—I think it has been tested out, in ordinary weather berries that are in

(Testimony of H. A. Baker.)

crates and put into a refrigerator-car will run about eighty and those berries, when they come into a refrigerator plant naturally would run somewhere about seventy-five, eighty to the barrel, and the sugar would naturally cool it off a little, and that heat has got to be taken out of that barrel, either by the barrels next to it or by the piping.

Q. And if the barrels in the first instance are not put into a freezing-room and frozen, then what would you say would be the requirements in the way to keep up additional refrigeration in the room into which the berries are being moved and in which they are already stored?

A. Why, it is getting to be the custom—is that when you mean, [154] freezing them in another room first?

Q. Yes.

A. They are using that more or less now. I haven't always found it necessary. They are now running the berries into a very cold room, from one below zero to fifteen above, to take the heat out, and then run them into a room around twenty-four or twenty-five. That is not absolutely necessary, if the room they are put in first is kept down to twenty-four or twenty-five, while the heat will come out of the barrel slower it will come out sufficiently fast to prevent the berries from fermenting, but the temperature has got to be kept down to that.

Q. Now, what is the effect upon the berries if the temperature is allowed to go above freezing, to

(Testimony of H. A. Baker.)

thirty-six degrees, we will say, and remains there for as much as four or five or six days?

A. Why, they are bound to ferment, and of course that is shown by the gas that comes from the top of the barrel.

Q. And as soon as they have reached a stage of fermentation produced by that treatment what is the effect upon the loganberries as to their food value?

A. Why, it is destroyed. The United States Government will not allow its use. It is like vinegar. It has gone into the first stage of fermentation, as sugar to alcohol, alcohol to acetic acid. Whenever there is alcohol formed there is always some acetic acid. You can't prevent getting a little acetic acid.

Q. From your knowledge of these berries—

A. How?

Q. I say, from your acquaintance with these berries that were subjected to this change in temperature in the cold-storage plant, the berries in question—

A. Oh, yes. [155]

Q. These 398 barrels, what would you say is their value—their food value?

A. Why, they are worthless. The Government would not allow us to sell.

Q. Is there any way that you know of by merely adding sugar and bringing those berries back to their normal stage? A. Absolutely absurd.

Mr. BOOTHE.—What is that answer.

Mr. SPENCER.—He said it was absurd.

(Testimony of H. A. Baker.)

A. It is just like bringing acetic acid back.

Q. Mr. Baker, Mr. Huntley, the first witness who was called in this case, testifies to making some—a chemical analysis of some of the samples taken from the barrels over there and that you accompanied him when he went there and got the samples. Now, I wish you would explain to the jury just how that was done, who went with you and what you did there.

A. I had taken several samples at different times during the summer. I had not realized at first that the trouble was as bad as it was. Of course that summer I had realized it. That was the previous year, this winter. I had taken several samples at different times and finally decided it was worthless and I had Mr. Huntley as an expert, a chemist, go down there with me, with his own eyes to see that he was selecting his own samples, and Mr. Patton went down with us.

Q. Who was Mr. Patton?

A. Mr. Patton is the foreman, as I understand it; he seems to have charge of it.

Q. Of the cold-storage plant?

A. Of the cold-storage plant. He took us down there and we wanted not only to pick out some loganberries out of the worst looking [156] barrels, we wanted some of the best looking. He was to give an unbiased opinion what the loganberries were, so he had a man come and open up some of the best looking barrels we could find there.

Q. Now, in the fall of 1920, what demand was there for loganberries on the market?

(Testimony of H. A. Baker.)

A. Why, on account of this large loss in fermentation we could not begin to fill the orders.

Mr. BOOTHE.—I beg your pardon; what was the question?

Mr. SPENCER.—I said what demand was there in the market in the fall of 1920 for loganberries?

Mr. BOOTHE.—I object to the fall of 1920. They claim this damage was done the last of July or first of August. If they were damaged at that time that is the time that the price should be fixed.

COURT.—He is not asking about the price, he is asking about the demand now.

Q. I will take the summer, then, the month of August and July, what demand was there in July or August for loganberries? A. 1920?

Q. Yes, sir. A. Very heavy.

Mr. BOOTHE.—What was the answer?

A. Very heavy in 1920.

Q. And did that demand continue throughout the fall of 1920?

A. Yes, we could not fill our orders.

Q. And had these loganberries been in the proper condition for handling as food when would you normally have moved them out of the cold-storage plant?

A. I think we would have had them cleaned up not later than probably January the first.

Q. January first, 1921? [157] A. 1921, yes.

Q. Or December 31, 1920?

A. December 31, 1920. You understand that on account of this fermentation there were some of our customers that had cancelled their orders.

(Testimony of H. A. Baker.)

Q. I understand. Where did you sell your loganberries, did you sell them, at that time?

Mr. BOOTHE.—If your Honor please, I object to this question. I want counsel to confine himself to the value of all those kind of things here in Portland, it is not in New York, or somewhere else.

Mr. SPENCER.—The market in New York is more or less dependent on the relation to our market in Portland.

Q. How are loganberries sold at Portland?

A. You mean in barrels?

Q. No, I mean loganberries you have here in cold storage, where do you sell them?

A. We sell them all over the country F. O. B. cold-storage in Portland. Portland is the market for loganberries of the United States or the world.

Q. They are sold F. O. B. Portland?

A. They are sold F. O. B. Portland cold-storage. Cold-storage Portland; yes, sir. This is the leading loganberry market of the world and consequently governs the market of the world.

Q. And the loganberry prices in the summer and fall of 1920, were they made on that basis, F. O. B. Portland? A. F. O. B. Portland.

Q. I don't know whether you have covered the question, Mr. Baker, but I want again to inquire whether or not during the summer or the fall of 1920 there was a sufficient demand so that you could have moved all of the loganberries which you packed that year? [158]

Mr. BOOTHE.—I object to that question as im-

(Testimony of H. A. Baker.)

material and irrelevant, whether there was any demand during the fall or not. Was there a demand here in Portland at the time these goods were said to be damaged is the question, I think.

Q. Well, confine it to Portland, Mr. Baker.

COURT.—All right, the question is the market value in Portland.

Mr. BOOTHE.—And at the time of the alleged loss or immediately after.

COURT.—Any time.

Mr. SPENCER.—I think, your Honor, the rule is, market value is to be measured as of the time when the consignor who places the goods in the cold-storage plant would normally have moved them out. That is my understanding.

COURT.—In the ordinary course of business, yes.

A. What was that question, again?

Q. Read as follows: I don't know whether you have covered the question, Mr. Baker, but I want again to inquire whether or not during the summer or the fall of 1920 there was a sufficient demand so that you could have moved all of the loganberries which were packed that year? A. I think so.

Q. And at Portland, Oregon, in, we will say, August, 1920, what was the market value of loganberries of the character that you handled?

A. My contracts were on the basis of seventeen and a half cents. The market value would run, of some of my competitors, up as high as twenty-

(Testimony of H. A. Baker.)

two cents. My contracts early in the year were on the basis of twelve and a half cents.

Q. But the market value you say would have been somewhat in excess of that?

A. Yes, the real market value at that time was probably around twenty [159] to twenty-two cents.

Q. What was the market value in August of 1920 for loganberries in the field from the growers?

A. Why, we were paying thirteen cents and doing all the delivery and all the packing and trucking and cold storage and selling at seventeen and a half cents.

Q. You only had four and a half cents to go on, then, as a margin?

A. That is all. We figure on small profits and volume.

Q. Would you say, Mr. Baker, that the 398 barrels involved in this case were worth in the market seventeen and a half cents in August, 1920?

A. They were worth that.

Q. Did that value continue throughout the fall of 1920?

A. Yes, sir, I think fully that value. Quotations were made, I think, much higher than that in instances.

Q. Have you been able to sell these loganberries, use them? A. These fermented ones?

Q. Yes.

A. Why, some of those that were sent to Chicago we have not been able to clean them all up yet;

(Testimony of H. A. Baker.)

some were on contract and the buyers had to take them.

Mr. BOOTHE.—I object to that.

COURT.—Confine yourself to the 398.

Q. I want to know about the 398 barrels, have you been able to sell them? A. No.

Q. And for what reason?

A. Because they are not fit for human consumption.

Mr. BOOTHE.—What is that?

A. They are not fit for food. The buyers have all rejected them.

Mr. SPENCER.—You may cross-examine.
[160]

Cross-examination.

(Questions by Mr. BOOTHE.)

Did you try to sell them to anybody here?

A. You mean here in Portland?

Q. Yes.

A. There is very little market here in Portland for loganberries, because they pack their own stuff. Our market is in the east, a big market.

Q. There was no market here for those berries in July and August of 1920? A. Yes.

Q. Who was buying here?

A. Through my brokers here or Jones & Company, of Chicago.

Q. Was there anybody in Oregon buying for anybody in Portland in July and August, 1920?

A. We don't look to Portland as a consumer, we look to our market in Chicago, for instance, Cincinnati, St. Louis.

(Testimony of H. A. Baker.)

Q. You have to take your chance of selling when you ship them?

A. Very small, only three cars in a thousand.

Q. Did you try to find any buyer for those goods in Portland during the month of August, 1920?

A. During the month of August, 1920; yes, sir.

Q. Who did you try?

A. Try, why, we were offering loganberries in 1920 until we ran into this fermentation.

Q. Did you show them to anybody?

A. These particular berries?

Q. These particular berries.

A. In August, 1920?

Q. Yes.

A. We could not, very well, Mr. Boothe— [161]

Q. Did you show them to anybody?

Mr. SPENCER.—Finish your answer.

A. We could not, very well, Mr. Boothe, because they had been thoroughly fermented out at that time. You don't know what shape they were in. As I told you before in my testimony, we shipped out in August car after car and they arrived back in Chicago in bad order, we could not go any faster than we did and had to stop.

Q. On July 31 they were all in good condition, you say?

A. All those that were in there on that date.

Q. Were you trying to sell them at that time?

A. Why, we were selling them at that time.

Q. Well, were you trying to sell these 398 barrels?

(Testimony of H. A. Baker.)

A. We could not look forward to these 398 barrels, we didn't know about this thing coming up at that time.

Q. Isn't it a fact that the market for loganberries went down, down, down, during the fall of 1920?

A. No, sir.

Q. You were not present when those berries were put into the plant, were you?

A. Into what plant?

Q. Into the cold-storage plant. A. No, sir.

Q. You don't know of your own knowledge what condition they were in, do you?

A. I do what I saw there on July 31st, yes, sir.

Q. You say that at that time they were all in good condition?

A. All that I could see and I think I saw practically all of them.

Q. What was the date that you and Mr. Huntley went to the plant to get that sample?

A. It was along late in October.

Q. What year? [162]

A. 1921.

Q. 1921? A. Yes, sir.

Q. And how did you get the goods out of the barrel, did you break the barrels?

A. Why, in some instances the stave was broken, in other instances the head was taken out and then we took some of the berries which were in the barrel.

Q. How many samples did you take?

(Testimony of H. A. Baker.)

A. We took samples out of about eight barrels, I think.

Q. How many times did you go there to get those samples?

A. Only once with Mr. Huntley. I was there with myself, alone; I think I took samples three different times.

Q. Did you tell Mr. Reid you were there, or ask for Mr. Reid?

A. You mean when? Before then? Mr. Reid knew I took samples out of there. I think he was with me once when we went down there and took a sample. Not when Mr. Huntley was with me.

Q. Did you ask for Mr. Reid when you went there with Mr. Huntley?

A. I am not sure. It was not necessary. Mr. Patton was there and I think he took me down. Whether Mr. Reid was there I am not sure, but I am inclined to think he was.

Q. Why didn't you get Mr. Reid and give him a chance to assist you?

A. I wanted a sample of that fruit, it didn't make any difference to me whether Mr. Patton gave it to me or Mr. Reid gave it to me.

Q. You wanted to get it without Mr. Reid knowing about it?

A. I think Mr. Reid was there, if I remember correctly, but I would not swear that he was. I know Mr. Patton took me down there.

Q. You were not very anxious to see Mr. Reid at that particular time?

(Testimony of H. A. Baker.)

A. It was immaterial, as long as I got the sample.

Q. Long before the first of August you knew that these berries were [163] fermenting, didn't you?

A. Along before the first of August?

Q. Yes. A. In 1920?

Q. In 1920. A. Absolutely not.

Q. You did not? A. No, sir.

Q. I call your attention to a letter of July 15, 1920, to the National Cold Storage & Ice Company, wherein you say, "We are storing barreled goods with you and wish you would wire this office at any time any of the barrels show distress." Why did you expect distress in them?

A. Why, that is simply a precaution, as I explained before. No, I didn't expect not to amount to anything other than an occasional barrel, as testified by the warehouse receipts here.

Q. And you say further: Should any of them commence to bulge at the head, take a six or eight penny-nail, drive it through the head three or four times, withdrawing it and allowing the gas to escape—and at all times notifying me and Van Doran.

A. Yes, I think—didn't I say in that to wire me immediately so that it could be taken care of to save any loss that might occur to that lot?

Q. Then you either knew or expected your berries would ferment?

A. No, I didn't know or expect it, because we took that precautionary measure in nearly every instance. Do you think I would put berries in there

(Testimony of H. A. Baker.)

if I expected them to ferment? Do you think berries costing me seventy dollars a barrel I would put in and let them ferment?

Q. I am asking you whether or not you anticipated their fermenting? A. No, I didn't. [164]

Q. Then why did you write this letter?

A. Just as I told you, because it was a precautionary measure to let them notify me immediately that we might stop any loss if fermentation occurred.

Q. Did you direct your truck drivers to drive any nails in these barrel heads before they got them to the cold-storage plant?

A. I had nothing to do with the truck drivers, but I am sure they were not.

Q. Do you know whether any of those barrels when they came to the cold-storage plant were plugged?

A. I never saw the barrels before they came to the cold-storage plant.

Q. You don't know whether they were plugged, do you?

A. I never saw them, except occasionally I was down at the plant, but I didn't see anything of the kind and the testimony of the boys would indicate there wasn't any.

Q. Did you at any time before these berries were placed in the National Cold Storage Company's plant direct them what temperature they should carry?

(Testimony of H. A. Baker.)

A. Why, yes, several years ago that had been taken care of properly.

Q. I am asking you about these 398 barrels?

A. About these 398 barrels? Custom, I think, covered that.

Q. What is that?

A. Custom, I think, covered that.

Q. Well, you did not direct them what temperature to maintain?

A. They had taken care of my barrels for years at the right temperature and they were instructed at that time and that covered these 398 barrels.

Q. You simply expected them to use their own judgment, such as they thought was necessary to take care of the berries?

A. No, they ought to have judgment at that time, after taking care [165] of them for years.

Q. I am asking you if you expected them to use their own judgment?

A. Yes, but qualify that. They were qualified after all these years of experience.

Q. You will get that in, but I would like to know, now, I am asking you again if you told them?

A. They charged us \$1.15 a hundred and it should have covered freezing.

Q. You haven't answered the question yet.

A. Added fifty cents a barrel, which covered freezing.

Q. Added fifty cents a barrel; that was to cover freezing, but did you tell them what temperature they should maintain on those goods?

(Testimony of H. A. Baker.)

A. Sure, yes.

Q. What was it?

A. From eighteen to twenty-four.

Q. When did you tell them?

A. Two or three years previous; four or five years previous, every year.

Q. You didn't tell them that about these particular berries, did you?

A. Man alive, they had been storing there for years, every year. They must have known the temperature. It could not be any different in 1920 from what it was in 1919 or seventeen or sixteen.

Q. I show you a letter and ask you if that is your signature; if you wrote the letter?

Mr. SPENCER.—What is the date of that letter? A. September seventh.

Mr. SPENCER.—Seventh?

Mr. BOOTHE.—Yes. A. Yes, I wrote that.

Mr. BOOTHE.—I offer this letter in evidence.

Mr. SPENCER.—No objection. [166]

Mr. BOOTHE.—I will read it to the jury now. (Reads as follows:) "Tacoma, Washington, 322 Tacoma Building, September 7, 1920. National Ice & Cold Storage Company, Portland, Oregon. Gentlemen: I wish you would kindly write me to the effect that you will assume the loss, due to fermentation on loganberries received by you this year from me in good condition. This is simply to confirm my conversation with Mr. Read, which I had when last in Portland—covering loss sustained by reason of the temperature in room being allowed to

(Testimony of H. A. Baker.)

go up to 36. Mr. Read stated at the time that there would be no equivocation. That he would speak to his father and forward me this assurance. It is my intention to make this loss just as light as possible, and an agreement on both sides will help the matter very materially. I wish you would load out one car containing all the strawberries which I think amount to 42 or 43 barrels, and sufficient loganberries to make up 100 barrels. This car to be shipped open billing to H. A. Baker, care of Western Cold Storage Company, 16th and State Streets, Chicago. Be very careful about having the car thoroughly braced and iced and salted. Also be very careful that every barrel that is placed in this car is in perfect condition. All barrels that have been vented should be plugged again and the heads cleaned up, also the sides of the barrels, so that they will not have the appearance of having been in distress. You will kindly notify Van Doren (interlined "Wire Van Doren when ready"), so that he may be with you when this car is loaded—and I am writing him to that effect. Yours very truly, H. A. Baker. P. S.—On second thought, I want you to cut down the temperature in that room to 24 for two days before this car goes out.

(Letter received in evidence and marked Defendant's Exhibit "A.")

Q. Now, when you wrote this letter you knew that some of these barrels had been plugged, did you not? [167]

A. I saw them there on August 20th, when I was

(Testimony of H. A. Baker.)

down there; there was a great many, nearly all the barrels had nail holes in them; they were oozing out.

Q. And you had previously directed them to drive six or eight penny-nails into the barrels to let the gas out?

A. Who?

Q. To the defendants.

A. Yes, and wire me immediately.

Q. And knowing that these barrels had been fermenting—

A. That would really cover the barrels when they came in from the drivers, if they came in in a bad shape, not to let the temperature run up and plug every barrel and let it out.

Q. Now, you seem to be very particular about the government not letting you sell berries that had been fermented? A. Yes, sir.

Q. Yet, notwithstanding this fact, on September seventh, after you knew those barrels had fermented, you wanted these people to plug them up very carefully and cover it up and clean the barrels so that it would not be discovered that they had been in distress? A. Yes, sir.

Q. You were willing, then, to sell these distressed berries to an innocent party, notwithstanding the Government?

A. Yes, sir; I didn't realize they were so *bar* as they were. My heavens, I had no idea.

Q. You knew they were bad?

A. I didn't know they were as bad as they were. I thought it was a slight fermentation. I had no

(Testimony of H. A. Baker.)

idea they were rotten as they were. Just as soon as that car went out, got back to Chicago, we stopped shipping them. I haven't shipped any since.

Q. Didn't you say when they were fermented they were spoiled for food? [168]

A. After wholly fermented. I said the 398 barrels were wholly fermented.

Q. And if they were fermented at all, so that they were sizzling in the barrels, they are fermented so that they are not fit for food?

A. I didn't say that.

Q. Is that a fact?

A. I said if they ferment all the sugar out of the fruit, so that there is nothing but alcohol and acetic acid left. That is the condition of these. When I shipped this car I thought it was only partial fermentation. I didn't realize until later it was complete fermentation.

Q. Yet you had been there on the sixteenth day of August and said it was fermenting so it had made you sick.

A. Yes, it did make me sick, seventy dollars a barrel going up in the air.

Q. Yet notwithstanding that fact you thought it was only slight fermentation when you were going to sell them?

A. I didn't think it was complete fermentation.

Q. Why did it make you sick?

A. When you get stuff that is fermented at all you have got to make a big discount to your buyer.

Q. I know, but you knew, according to your own

(Testimony of H. A. Baker.)

testimony, you knew they were fermenting? Here about on the sixteenth of August it made you sick and yet on the seventh of September, knowing that fact, you ask these people to plug them up and smooth them up and send them back to enable you to sell them to the public, knowing that fact. Now, isn't that true?

A. You put it a little strong.

Q. Doesn't that writing say that?

A. I didn't realize it was as bad as they were. I thought it was [169] partial fermentation.

Q. Now, Mr. Baker, if you didn't realize they were as bad as they were and thought it was partial fermentation, they had some value, did they?

A. I found out it was complete fermentation when I got them back there. It was complete fermentation.

Q. But on the seventh day of September you thought that there was only a slight fermentation and that the berries were good and salable?

A. I didn't think they were good and salable.

Q. What did you want to sell them for?

A. I was going to sell them for what they were worth. We didn't sell them, we sent them back to Chicago. Those are not sold. We sent them back to Chicago to see what we could do with them. We soon found out we could not do anything with them.

Q. You wanted them to ship one hundred barrels?

A. To myself; I didn't ship those to any customer. I took them back to see whether they could

(Testimony of H. A. Baker.)

use them or not. I wish to Heavens I hadn't. I wish they were right here in Portland now.

Q. You wanted the sides of the barrels plugged up, so that they would not have the appearance of having been in distress?

A. That is so, exactly. I didn't think they were so bad until I got them back there and sent to our customers and they turned them down.

Q. I want to know if you thought those berries had value September seventh?

A. I thought they did, but I found they did not.

Q. Did you try to sell them?

A. On September seventh?

Q. Yes.

A. As soon as this car got into Chicago we tried to sell them, yes. [1691½]

Q. Didn't you know it was your duty to take those goods, if you found they were damaged, and dispose of them and minimize the loss as much as possible?

A. It was impossible to dispose of that; that is what I was trying to do. I had them sent to Chicago, sent to my customers, and they turned them down.

Q. Did you do anything with these 398 barrels?

A. I could not. This is a sample of those. It was then about 498. A Sample is what we go by and we could do nothing with them.

Q. Did you try to do anything with those 398 barrels?

(Testimony of H. A. Baker.)

A. Why should I, when I could not sell those one hundred out of the same lot?

Q. Isn't it a fact, Mr. Baker, after this September seventh, or some time along there, you came and saw Mr. Reid and wanted him to sign some kind of an agreement by which he would be willing that you should send those goods to Chicago to be sold, provided he, Reid, would make up whatever there was lost between the price of sale and the seventeen and a half cents? Did you try to get him to sign a contract of that kind? A. Yes.

Q. You tried to get him to do that? A. Yes.

Q. Now, didn't Mr. Reid answer this letter of September seventh?

A. I think he did; I am not sure whether we have it here with us or not.

Mr. BOOTHE.—I would like to have counsel—they have had notice—produce the letter dated September 10, 1920; also one of August 9, 1920.

Mr. SPENCER.—I haven't got that letter of August 9.

Mr. BOOTHE.—And September 16.

Mr. SPENCER.—Let me see your copy of that letter of [170] August 9. I haven't that. I haven't a copy of that.

Mr. BOOTHE.—Have you of September sixteenth?

Mr. SPENCER.—Yes.

Q. I will ask you if you received this letter from the defendants?

A. September 10, 1920? I think so, yes.

(Testimony of H. A. Baker.)

Q. And this one of September 16th?

A. I think so, yes, sir.

(Letter of September 10, 1920, received in evidence and marked Defendant's Exhibit "B.")

(Letter of September 16, 1920, received in evidence and marked Defendant's Exhibit "C.")

Mr. BOOTHE.—Letter of September 10, addressed to H. A. Baker, 322 Tacoma Building, Tacoma, Washington. (Reads as follows:) In reply to your letter of the 7th instant regarding loss on loganberries, we wish to state that we cannot agree to assume all the loss due to fermentation as proposed by you, for the reason that many of the barrels were in bad condition when received by us; in many instances a number of barrels blew before we could get them unloaded from trucks and transferred to the basement. Many of the barrels were filled too full and the hot temperature of the outside atmosphere caused gas to form thereby resulting in distressed barrels. The fermentation started before going into cold storage. Therefore it would be impossible for us to ascertain just what amount of loss was due to our letting temperature get above freezing point for a few days. We will admit that at the time you inspected the goods the temperature was higher than it should have been and that the barrels showed fermentation but we at once reduced the temperature to 26 degrees and we have held it at this or colder which has stopped fermentation and they now seem to be in good condition. The temperature is now 24 degrees and

(Testimony of H. A. Baker.)

the barrels are now ready for shipment, and as per your order for Chicago, a car has been ordered and [171] we are assured the spotting of this car for loading on Saturday the 11th inst. As soon as we know definitely, we will wire Mr. Van Doran. We are willing and want to be fair towards adjusting any loss that we are responsible for but cannot accede to your demand to assume all the loss due to fermentation. The depreciation to contents of barrels will not amount to much as they were frozen most of the time except for a day or two.

The balance of this letter is about something else. The letter of September 16th, addressed to H. A. Baker. Both of these letters are signed by the National Cold-Storage & Ice Company. (Reads letter of September 16, 1920, as follows:) Yours of the 11th inst. to hand and in answer thereto we wish to say that we cannot assume the loss as mentioned in your letters of September 7th and 11th. We have fully explained our position in our letter of the 10th to the effect that we are willing and want to be fair toward adjusting any loss that we are responsible for. You say that this can only be done by our assuring you that we will assume the loss. This would harmonize matters entirely in your favor but not for us. The proper time for adjustment will be after said goods are disposed of, when the actual loss can be determined and at that time we will take up the matter of adjusting any loss that you claim to have sustained on account of our not

(Testimony of H. A. Baker.)

properly handling the goods while in storage. Loganberries are a very difficult commodity to handle and when the barrels were received at our plant, a great many were blowing and bursting, others were fermenting and heads of barrels bulging, so nail holes were made to relieve the gas pressure but notations were not made on the receipts at the time and we do not wish you to assume that all barrels were received in good condition. Car containing 40 barrels strawberries and 60 barrels loganberries left on the 14th of September for Minnesota Transfer. Mr. Van Doren was here and checked same finding all the barrels in good condition. Have been unable [172] to get car for Chicago but expect car by to-morrow. We will wire Mr. Van Doren as requested.

Mr. BOOTHE.—May I read a copy of the letter you cannot produce?

Mr. SPENCER.—Yes.

Mr. BOOTHE.—No objection to this letter and I will ask to have it marked as an exhibit.

(Copy of letter of August 9, 1920, received in evidence and marked Defendant's Exhibit "D.")

Mr. BOOTHE.—Reading from copy of letter of August 9, 1920, written by the National Cold-Storage and Ice Company to H. A. Baker, Salem, Oregon. "We have on hand now about 50 bbls. that have blowed and as we have orders to ship these out we suggest that you send your men here to re-cooper and put them in shape for shipping. Out of the

(Testimony of H. A. Baker.)

last 31 received here, 11 have blowed and 1 that came in last night was a total loss.”

Q. Now, it was after receipt of this letter—do you remember receiving this letter?

A. I don't remember receiving it. We have no copy of it.

Q. It was right after that you sent Van Doren?

A. No, not until after we received the letter about the fifteenth.

Q. It was right after this notification you sent Van Doren and Mr. Ireland down to the plant to re-cooper those barrels, was it not?

A. Yes, a few days afterwards, but I think it was not in response to that letter, it was in response to the telegram.

Q. Is Mr. Van Doren entitled to receive your mail at Salem? A. Yes.

Q. And the probabilities are he must have received this letter, as they came down and attended to re-coopering these barrels right away.

A. No, he didn't until he got the wire from them.

Q. Now, going back again to this question of trying to adjust this [173] loss, isn't it a fact—

Mr. SPENCER.—Is that copy of that letter in evidence? A. Yes.

Mr. SPENCER.—It was not identified.

Mr. BOOTHE.—I thought you admitted it might go in.

Mr. SPENCER.—That is why I asked you.

Q. I will ask you if you remember receiving that.

(Testimony of H. A. Baker.)

(Referring to a letter of August 9th previously marked Defendant's Exhibit "D.")

A. No, I don't remember receiving that.

MR. BOOTHE.—I offer it for identification.

(Letter of August 9th, above referred to, marked Defendant's Exhibit "D" for Identification.)

A. This I see was sent to H. A. Baker at Salem.

Q. Yes.

A. Usually when it is sent to me personally it was forwarded to me at Tacoma at that time. However, I don't remember it.

Q. Now, you have related something about your seeing young Mr. Reid at the plant there about the sixteenth of August, at the time you say there was such fermentation that you were made sick as to the result. Now, following it, isn't it a fact that even after writing these letters to the defendants, trying to get them to acknowledge liability, isn't it a fact you got up an agreement and asked them to sign it—tried to get them to sign it, whereby you were to ship these goods to Chicago and they guaranteed that they would bring seventeen and a half cents a pound? Didn't you try to do that?

A. No, you changed it a little.

Q. What did you try to do?

A. We wanted them to agree to indemnify us between the price and what they cost us. We figured the cost at that time was sixteen cents, and we thought they should, no matter whether we got anything out of them or not. In fact, they did agree

(Testimony of H. A. Baker.)

to do it and then when you stepped into the matter you stopped them.

Q. Yes, we had a meeting at the Benson Hotel, did we not?

A. Yes, and before you came there, down at the plant, they agreed to indemnify us. [174]

Q. They agreed to? A. Yes, sir.

Q. You testify they agreed to? A. Yes, sir.

Q. Why didn't they sign it then?

A. At the last moment they decided to get your advice.

Q. Then they hadn't agreed to it?

A. They did, yes, but you didn't agree to it.

Q. Now, then, at that conversation we had at the Benson Hotel, Mr. Reid, Senior, was present, wasn't he? A. Yes, sir.

Q. This gentleman here was present?

A. Yes, sir.

Q. Van Kesler? A. Yes, sir.

Q. He was there? A. Yes, sir.

Q. Now, didn't Mr. Reid state to you, after we had discussed that matter, Mr. Baker, "If I have damaged your goods any, tell me how much it is and then I will see whether I will pay it?"

A. I think after he saw you he did, up at the Benson Hotel, yes, sir.

Q. That was the final thing that was done?

A. I think he said that at first at the plant, but afterwards I think his son talked him into the other agreement as the best way to handle it then.

Q. When he demanded from you at that time to

(Testimony of H. A. Baker.)

know what you would ask for damages, did you not say, "Mr. Reid, I cannot tell you"?

A. Absolutely I could not have done it, I could not tell what it was.

Q. Then what were you after him for, for damages, if you didn't know what you were damaged?

A. Because the contract covered that. I didn't make a stated amount [175] in the contract, it was covered by my losses and damages. We didn't make a stated amount.

Q. You were driving them into a hole where they would make your losses absolutely safe?

A. Because of the way they handled those goods.

Q. And did they not tell you at that time that those goods when they came into the warehouse were in a damaged condition?

A. Your warehouse receipts show there was only about eleven in bad condition and I saw, when I was there on the first of August—there had been about thirteen hundred barrels, I think, through the cold-storage, these what we were shipping and what were there then and I saw them and knew they were in good condition on that date.

Q. Can you say what was the value of those goods on the thirty-first of July?

A. What was the value of them?

Q. Yes.

A. Seventeen and a half cents a pound.

Q. Can you say what was the value of them on the sixteenth day of August?

A. No, not after they had been through that. I

(Testimony of H. A. Baker.)

thought they were worth more than they were, but later I found out they were worthless. A lot of them at that time I thought they were worth something.

Q. After you had examined these goods, after you had seen them after they were damaged, you didn't make any effort to dispose of them?

A. You bet we did. Ask Mr. Van Kesler, he will tell you how much effort we made to dispose of them. They would not let us ship them out.

Q. You took it they were worthless simply because your chemist told you they were worthless?

A. The chemist didn't come into it until long after we had decided. He didn't come into it until in October, 1921, and we had been trying [176] all this time to sell this stuff back in Chicago.

Q. Mr. Baker, did you receive from the National a statement of the amount—

A. Not after November, 1920.

Q. When?

A. November, 1920, they stopped. We didn't receive any after that. When this discussion came up they didn't forward us any statements after that.

Q. Did you pay the storage on these goods?

A. No, I naturally would not, in this condition.

Q. You say so in your complaint, don't you? Don't you say in your complaint you paid the storage?

A. I don't think so; if so it is an error.

(Testimony of H. A. Baker.)

Q. I call your attention to the allegation in the complaint here—

A. Take that up with Mr. Spencer.

Q. Paragraph V—

Mr. SPENCER.—Blame it on his lawyer. I verified the complaint in the absence of Mr. Baker.

Q. I will ask you whether it is true or not—

Mr. BOOTHE.—We agreed to strike out the word “frozen.”

Mr. SPENCER.—I admit it.

Mr. BOOTHE.—Let the record show it is admitted that the charges have not been paid.

A. They have not been paid.

Mr. BOOTHE.—But I want to read the paragraph of the complaint, just the same; as amended by the stipulation the word “frozen” would be left out and the words “state of refrigeration” were to be left out and “proper condition” inserted. So it would read this way now: “That said loganberries when delivered to the defendants were in a proper condition”—I believe that is the way it was, “in proper condition, and the plaintiff has at all times paid all the charges which have [177] been demanded by defendants and has at all times performed all acts and things on his part to be done.” Then that is not true, then?

A. You didn’t present any statement after November, after this difficulty came up; at least we never received any through the mail at any of our offices.

Q. Well, you never paid anything.

(Testimony of H. A. Baker.)

A. No, we never paid anything.

Q. Do you know how much they claim from you?

A. I think it is a little over five thousand dollars. Of course that is incorrect.

Q. That is correct according to the agreement, wasn't it? A. How.

Q. That would be the correct amount according to the agreement?

A. I don't think so. I haven't gone into that. I would not say so. That includes the 398 barrels you have charged storage on a couple of years.

Redirect Examination.

Q. This question of the rendition of this bill, Mr. Baker, I will hand you a bill dated October 31, on the billhead of the National Cold Storage & Ice Company, and ask you if you recognize that?

A. Yes; it is one we received.

Q. And is that the last bill you have a record of receiving?

A. It is the last statement. We have a few individual invoices about between the first and the tenth of November, and then they stopped altogether.

Q. This is made out as of October 31, 1920?

A. Yes, this is a complete statement up to that date. We never checked that at all.

Q. And during all this time there was a dispute on between yourself and the Reids as to how much they should pay you? [178] A. Yes, sir.

Q. For the berries that had been damaged?

A. Yes, sir.

(Testimony of H. A. Baker.)

Q. Your understanding, as I get it, is that the bill of five thousand dollars which they have set up in their answer includes storage charges on the 398 barrels down, I believe, to the filing of the complaint in this action? A. I think so.

Mr. SPENCER.—I will offer this statement in evidence as the statement of charges down to November 1, 1920.

A. Everything was out of storage, of course, except the 398 barrels at that time, and that includes the storage on the 398 barrels that were still there.

(Statement received in evidence and marked Plaintiff's Exhibit 6.)

Q. I think you have covered the situation as to what you did toward trying to salvage or sell this stuff in the east. How much effort was made in that respect by you to sell these loganberries?

A. Why, we covered the whole United States through our brokers, C. L. Jones & Company, of Chicago and Boston. They cover all the trade that requires that kind of stuff, through circulars sent out every week, to dispose of these goods—our goods; circularized very thoroughly; then personally. I go east every year in the spring, calling on the trade all over the United States.

Q. Something was said by Mr. Boothe about your shipping this stuff east, that you took the chance on it when you shipped it east. As I understood your testimony in the beginning, you sell your stuff F. O. B. Portland?

(Testimony of H. A. Baker.)

A. F. O. B. Portland, yes, sir, we do now. When I first went into the field we used to sell it, until we got the trade established, we [179] sold it F. O. B. delivery point; that was the first few years, until our customers now recognize it as just as standard as butter or any other commodity, so we make them buy now here, F. O. B. in cold storage at the packing plant, wherever it may be, whether it is California, Washington, Oregon, Louisiana, or wherever it may be.

Q. So that goods F. O. B. Portland you assume no risk on that from the time it leaves Portland?

A. Not on the berries which are sold.

Mr. SPENCER.—I think that is all.

Recross-examination.

Q. I would like permission to introduce one or two more letters, if there is no objection. I find them here.

Mr. SPENCER.—Yes.

Q. I show you letter dated August 25, is it?

A. August 25th.

Q. Purporting to have been written by you to the National Cold Storage & Ice Company, and ask you if you wrote that and signed it?

A. Yes.

Q. And one dated September 11; that is your signature to that letter?

A. Yes, I think so. My signature is on the letter, but—

Q. That is your letter of October 5th? A. Yes.

(Testimony of H. A. Baker.)

(Letter of August 25, 1920, received in evidence, marked Defendant's Exhibit "E," and read as follows:)

"Tacoma, Washington, 322 Tacoma Building, August 25, 1920. National Cold Storage & Ice Company, Portland, Oregon. Gentlemen: Acknowledging your favor of August 24th, beg to advise that the temperature of 27, will, I think, be satisfactory, but be very careful to keep the temperature at least as low as that. As soon as I have an [180] opportunity, I will remove some of the stock. In the meantime, it will be necessary to reweigh all of these barrels as undoubtedly from 5 to 10# has oozed out of each, owing to the fermentation, caused by the high temperature which you allowed to occur. The cancelling of the warehouse receipt is perfectly correct. Yours very truly, H. A. Baker."

(Letter of September 11, 1920, received in evidence, marked Defendant's Exhibit "F" and read as follows:)

"Tacoma, Washington, 322 Tacoma Building. September 11, 1920. The National Ice & Cold Storage Company, Portland, Oregon. Gentlemen: Answering your kind favor of September 10th, beg to advise that I did not expect you to assume any liability for loss from fermentation when barrels were received in bad condition by yourselves. Of course, this would be indicated by the receipts, as you should, and undoubtedly did, indicate on the receipts all barrels that arrived in poor condi-

(Testimony of H. A. Baker.)

tion. That being the case, I wish you would write me a letter that you will assume any loss from fermentation on all loganberries other than those received in bad condition and so indicated on the receipt.

This I must insist upon before moving these loganberries—otherwise, I shall take the matter into court and I fear if the health authorities get hold of it, it will be serious. As it is, I hope to make the claim a comparatively light one. It is rather unfortunate that you shipped any loganberries at a time when the temperature was running from 33 to 36. That is what is now causing trouble in the east, as indicated by the car shipped to Durand & Kasper. However, I am handling the matter there to the best of my ability and for your interest—as I could, if I so desire, throw the whole responsibility upon you. I trust, and expect that you will work in harmony [181] to make this loss as light as possible, and this can only be done by you assuring me that you will assume this loss. This must be done in writing. Kindly attend to this at once.

You may ship one car of loganberries to Durand & Kasper, care of the Western Cold Storage Company, Chicago,—open bill of lading, usual precautions for bracing and icing. Use very, very, very great care to see that this car is in perfect condition, and that the barrels are thoroughly washed, marked and re-plugged, so that there can be no suspicion of trouble. You understand this is abso-

(Testimony of H. A. Baker.)

lutely necessary for the reason that Durand and Kasper are now on the alert for trouble. I am writing J. D. Van Doren that you will wire him when you are ready to load this car out, that he may personally inspect it. This is absolutely necessary. Yours very truly, H. A. Baker.”

(Letter of October 5, 1920, received in evidence, marked Defendant's Exhibit “G,” and read as follows:)

“Tacoma, Washington, 322 Tacoma Building, Oct. 5, 1920. National Ice & Cold Storage Company, Portland, Oregon. Gentlemen: I wish you would raise the temperature of the room in which our fruits are stored to about 24 or 25. We expect some bursting of the heads in the barrels, which is certainly much more satisfactory than having them leak—as we know when the bursting is caused by expansion that they are frozen.”

Mr. BOOTHE.—The balance of the letter is about a warehouse receipt, not necessary to read. Does not pertain to this question. I believe that is all.

Redirect Examination.

Q. Mr. Baker, this last letter has a portion in it here about bursting by expansion. You say “We know when the bursting is caused by expansion that they are frozen.” Explain that, will you?

A. What is the date of that?

Q. That is October 5th. [182]

A. On October 5th. That is answer to a statement they had got the temperature down so that it

(Testimony of H. A. Baker.)

would penetrate the barrel. Mr. Boothe has spoken about the barrel being too full. That is true; sometimes the barrels do get a little too full and then when they are frozen, after that, a month or so, they begin to expand, they force the head out through expansion. That would not hurt the fruit; that fruit is good as long as it is thoroughly frozen. It will expand and force the head out. It is an entirely different cause from fermentation. Fermentation is where the expansion is caused by the gas forcing it out. That comes early, when you first put it in, but after it is once frozen and remains cool, below, say, twenty-six, then there is no danger at all. Now, this here, being October 5th, that had become thoroughly frozen and it was better to keep it; clearly there was gas in it, and the more you freeze it with gas in it the more it will expand, and I wanted to prevent that as much as possible.

Q. In your letter of August 25 you said something about the temperature of 27 being satisfactory.

A. I was absolutely up against it. They were up against it. They had promised to sell too much ice and they promised cold storage to me and I was trying to coax them along on assuming this loss on this stuff.

Q. I am coming to that. This question of a settlement. When this condition of the loganberries developed there in the middle of August, and on, and you knew what the temperature had been up to—to what point it had been, what were you endeavor-

(Testimony of H. A. Baker.)

ing to do with respect—first of all, with respect to this product that you had on storage there?

A. I was trying to get the best I could out of it. This was my first experience, I had never had anything like this before. I didn't realize it was absolutely ruined until very much later on; even until, say, into the next spring, I thought it had some value.

Q. Your idea was that you could salvage it out in some way, perhaps? [183]

A. I hoped to.

Q. And in taking up this proposition of settlement with Mr. Reid, what was the result of your conversation with him. Counsel has gone into that.

A. Well, early in the game I thought there was some salvage value, but later on I was practically sure there was no salvage value, but I felt he should sustain the loss and I wanted to get him to state he would and he did verbally.

Q. And finally, as a result of your efforts to salvage the product on the various markets, what were you able to do?

A. Could not do anything. They were turned down. They sent this car back to Chicago, this last car and tried to sell it to different buyers; they would take it up and try it and turn it down; couldn't use it, it was worthless.

Mr. SPENCER.—That is all.

Recross-examination.

Q. Now, that car you have just spoken about

(Testimony of H. A. Baker.)

trying to sell in Chicago wasn't any part of these 398 barrels?

A. It was a part of it. This—that is the part we shipped out; it wasn't 398, but it was 498 at that time.

Q. Then at that time you commenced this action you didn't have 398 barrels there?

A. Yes, we had 398 barrels at the time we started this action, but at the time we made this shipment we had 498. It was the same lot, same condition.

Q. When did you make that shipment?

A. September, I think. The records show. I think it was September some time.

Q. Then you say you had 398 barrels left after that? A. Yes, about that.

Q. How long were those goods on the road to Chicago? [184]

A. Why, I don't remember. Absolutely. Usually they took from nine to twelve days.

Q. Takes about seventeen days, doesn't it?

A. No, sir; takes from nine to twelve days. Anyway, we never have any losses to speak of.

Q. I think when you examine the shipping receipts you will find it took seventeen days. Do you remember when we took depositions in Chicago we figured it out it took seventeen days?

A. I think a car sometimes will take seventeen days, but usually it is from nine to twelve days.

Q. During all the time they are out of the warehouse you don't know what temperature has been maintained by the refrigerator car, do you?

(Testimony of H. A. Baker.)

A. No.

Q. You don't know what has been done to those berries en route?

A. If we have any trouble we can chase it up through the records of the railroad company, to see whether they are properly iced and salted, but from the reason we don't have any trouble we figure they were.

Q. Did you ever enter suits against the railroad companies for goods damaged en route?

A. Do you mean these last or others?

Q. Any of them.

A. Yes, but I think they were directed—

Q. I mean, are you suing any railroad companies?

A. They are suing the railroad companies, but they realize now where the trouble is, I think they have all withdrawn from the railroad part of it.

Q. There is a suit pending now, isn't there?

A. I think not; I think that has been withdrawn, Mr. Boothe.

Q. Isn't suit pending now of McNeil and Hawkins against the railroad company? [185]

A. I just received a letter—I have been receiving two or three letters during the last week, and they are suing you and me, or are going to sue you and me.

Q. How do you find that out now?

A. Through their lawyer, has been writing me the last two or three days.

Q. What lawyers?

(Testimony of H. A. Baker.)

A. Blum, Owens and something—Hudson and Blum, 110 South Dearborn Street, Chicago.

Q. What have they notified you? What have they written you?

A. Why, they wrote us that they had taken depositions out here through a lawyer, in which I think Mr. Reid and Mr. Patton and Mr. Kennedy were accused in the matter and they had come to the decision that the railroad company was not at fault, that it was either against the cold-storage company or myself.

Q. Have you got that letter?

A. No. I have got one letter from them, the last letter I received.

Q. Have they dismissed their case?

A. I would not say; the inference is that they did. I would not say positively. As I said before, I am not sure, but I know they are considering it; at least they wrote me they were.

Mr. BOOTHE.—That is all.

Witness excused.

Testimony of Robert Ireland, for Plaintiff.

ROBERT IRELAND, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Question by Mr. SPENCER.)

Mr. Ireland, what business are you in?

A. Manager of the Terminal Ice and Cold Storage Company. [186]

(Testimony of Robert Ireland.)

Q. Where are you located?

A. Third and Hoyt.

Q. In Portland, Oregon? A. Yes, sir.

Q. How long have you been in the cold-storage business? A. Five years.

Q. And in the city all the time?

A. All the time.

Q. And connected with the Terminal Ice and Cold Storage Company? A. Yes, sir.

Q. And do you handle barreled loganberries?

A. Yes, sir.

Q. Have you stored and handled barreled loganberries for Mr. H. A. Baker? A. I have.

Q. What years?

A. 1918 and 1921. I am handling some for him now.

Q. You are handling some for him now?

A. Yes.

Q. You are connected, are you, with the operating end of your cold-storage plant? A. Yes, sir.

Q. And do you know the degrees of temperature that should be maintained in order to preserve those products? A. I do.

Q. When loganberries are brought to the plant what would you say would be the proper degree of temperature to be given to the berries to protect them and prevent them from deterioration?

A. From zero to fifteen above.

Q. By that do you mean that you first freeze them? A. Yes, freeze them all.

(Testimony of Robert Ireland.)

Q. What do you do about putting them into a separate room or not? [187]

A. Put them into a room and then take them from one room and pile them in a room of twenty-two degrees.

Q. You do what?

A. Freeze them first and put them in a higher room of twenty-two degrees.

Q. And then what do you do as to maintaining that temperature of twenty-two degrees?

A. Well, you keep a thermometer in the room all the time and the man calls every hour to read the thermometer, so that the temperature is kept there constantly.

Q. And do you permit the temperature to rise and fall with any great degree of variation; for example, up to thirty-two or above?

A. No, sir.

Q. What would be the effect on frozen loganberries, refrigerated loganberries, if the temperature was allowed to go to thirty-six degrees and stay there for five or six days?

A. Well, they would thaw out.

Q. Do you charge—you have an initial charge for freezing?

A. Yes, sir, in addition to the storage.

Q. When Mr. Baker stores with you each year does he make a separate contract and give you special directions each year with respect to the temperature to be maintained?

(Testimony of Robert Ireland.)

A. Yes, he always has us keep the temperature down.

Q. I mean, does he talk with you every year when he does his storing with you, about that?

A. No, sir.

Q. How was that handled?

A. Well, I would not take berries in unless I would keep the temperature down, because I know they would not keep?

Q. And what arrangement—was that arrangement made at the beginning of your experience?

A. Yes, we sent out cards to that effect. [188]

Mr. SPENCER.—Cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

Mr. Ireland, supposing the berries had been frozen, well, frozen, when they were put in there and temperature maintained along, say, twenty-four, twenty-five or twenty-six there, and then suppose the berries were in good condition—suppose they came in there in good condition and you should let that temperature change around a little from thirty-two, thirty-three, thirty-four, thirty-five and maybe to thirty-six a day and then put it right back down again, do you think there should be any damage to those goods?

A. Well, if held any length of time there would be.

Q. Yes; but suppose, then, Mr. Ireland, some of those goods were not in good condition and some

(Testimony of Robert Ireland.)

even in fermented condition when they were put in and this temperature goes up and those that were in good condition did not ferment at all but the others that had formerly fermented began to ferment again, would you say if they had been in good condition they also would have kept along with the good ones?

A. Well, that is a pretty hard thing to say; I don't know whether they would or not.

Q. It would be reasonable to suppose that they would, wouldn't it?

A. You mean that they would keep?

Q. That they would keep if they were in good condition and had been in good condition all the time?

A. Well, a loganberry, as a rule it ferments very quickly and I could not state as to the time it would take for them to ferment again.

Q. Have you ever had any of those loganberries brought to your plant in a fermenting condition?

A. I have, yes, sir. [189]

Q. What do you do with them when they do that?

A. Well, we would attend to them and put them right in the freezer.

Q. Do you consider they are damaged when they are fermenting?

A. Well, of course they are not so good, but we have never had any trouble with them.

Q. After you freeze them and keep them frozen right along they sell—they are all right, are they?

(Testimony of Robert Ireland.)

A. They are always taken out. We never had any claims to make.

Q. Never had any barrels burst, blow up on you?

A. Yes, we have barrels come in that are too full and the freezing will break the head out of the barrel.

Q. I mean when they are brought to the plant, if you had any brought there in such a warm temperature that they blew up before you could get them in? A. Yes, sir, I have.

Q. Then you have had a similar condition to what has been related here, goods have been brought to the plant in a fermenting condition and are put in and frozen? A. Yes.

Q. And you have had occasion, where they had begun to ferment again after they were frozen?

A. No, sir.

Q. Keep them frozen all the time?

A. Yes, sir.

Q. When you freeze a barrel it swells the head and they burst?

A. Yes, if the barrel is too full. There is a certain expansion, which ought to be about six inches on the top of the barrel for expansion, and if the barrels are too full it will break the—

Q. Now, Mr. Ireland, suppose in this case of the defendants here that some of those berries had been brought there in barrels in a [190] fermenting condition, so that you could hear them sizzling, for instance, and then suppose they afterwards, after they had been frozen, began to ferment again for

(Testimony of Robert Ireland.)

a few days. Now, where is the damage? Which is the damage, the first or the last fermentation?

A. Well, I could not say.

Q. You could not say. You could not say how much damage there was to the first fermentation then, could you? A. No, I could not, Mr. Boothe.

Q. And could you say how much damage there was to the berries by the second fermentation?

A. No.

Q. Could you say, then, they were damaged any substantial amount?

A. Well, I don't know as I could, no.

Q. But in your instances they have gone through and been sold and nothing said?

A. Yes, sir, as long as you keep them frozen, why they go through.

Q. Do you know anything about the value of loganberries in July and August, 1920? A. 1920?

Mr. SPENCER.—I didn't ask the witness anything about that.

Mr. BOOTHE.—I will pass it then, I will not ask it.

That is all.

Redirect Examination.

Q. Mr. Ireland, speaking of the receipt of barrels which might be called in bad order, what is the practice as to noting that on the receipts issued by your company?

A. Well, if the barrel comes in in a leaking condition or fermenting at all, we mark it in bad order on the receiving slip.

(Testimony of Robert Ireland.)

Q. A barrel may come in leaking and yet not be fermenting, isn't that true? A. Yes.

Q. Maybe something happened to it in the handling it to have broken the head, something of that kind, and be absolutely free from fermentation? [191]

A. Well, we have had that.

Q. Now, what is the effect of moving into a cold-storage room where barrels are stored—moving into that room new barrels that just came from the outside, haven't been under refrigeration; what is the effect? A. Well, we have to—

Q. I mean as to the temperature of the room.

A. It will raise the temperature of the room.

Q. Now, you have said that you had some barrels at times in your plant that showed distress; that is a condition of affairs that to some degree is bound to occur?

A. It is very general, in some cases, with loganberries.

Q. Now, however, the condition which you have described in your plant, did you ever have present there a state of temperature running up to thirty-six degrees and staying around there for four or five or six days? A. No, sir.

Q. And the loganberries subjected to that state of affairs? A. No, sir.

Mr. SPENCER.—That is all.

Recross-examination.

Q. Now, about those, did you ever have any of

(Testimony of Robert Ireland.)

those barrels come in and bursting in your plant as they came in? A. Yes, sir.

Q. What about that?

A. Well, they are received in that condition.

Q. Did one of those barrels blow up and injure a man one day in your plant?

A. Yes, sir. [192]

Q. Pretty nearly killed him, didn't it?

A. Yes, sir.

Q. Weren't there berries scattered all over your floor at times? A. Yes, sir.

Q. They come in usually in pretty bad condition, don't they?

A. Well, there is times that they would come in bad condition, but we always mark the receipt that way, and say that is the condition they came in.

Q. Mr. Ireland, suppose those barrels, fifty gallon barrels, I believe they were, were shipped in from Salem by truck, fifty-two miles away, solid tire truck, hauled to Portland all that distance in three hours and a half to four hours, is that hauling them pretty fast for their good?

A. Well, if the berries are in good condition when put up they come through in pretty good shape; sometimes they ferment.

Q. Wouldn't that have a tendency to churn them up and make them ferment?

A. I don't know as it is that that does it. It is the heat, the temperature of the day outside, putting

(Testimony of Robert Ireland.)

the berries in the hot barrel, the hot barrel starts fermentation.

Q. That has a good deal to do with it, but churning assists also, does it not? A. It might, yes.

Mr. BOOTHE.—I think that is all.

Redirect Examination.

Q. Mr. Ireland, you have spoken about receiving bad order goods, loganberries; you handled goods for Mr. Baker, in 1918? A. Yes, sir.

Q. Do you know where they came from?

A. They came from Salem.

Q. And how they got down to your plant in 1918?
[193]

A. Well, they came by truck. Let's see, now. I don't know. 1918. I think some came by truck and some by express and some by freight, in cars.

Q. And you handled goods for him, loganberries—barreled loganberries—in 1921? A. Yes, sir.

Q. How did they come down to your plant?

A. They came by truck.

Q. By truck? A. Yes, sir.

Q. And what has been your experience as to the handling of loganberries by truck as compared with train?

A. Well, we like to handle them by truck better than we do by train.

Q. Why is that?

A. Well, they come in quicker; we get them quicker.

Q. You get them quicker? A. Yes, sir.

(Testimony of Robert Ireland.)

Q. And these loganberries you handled for Mr. Baker in 1918 and 1921, did you experience any particular difficulty as to blowing and sizzling and so on, with them?

A. We had a few barrels, yes; lose a few barrels.

Q. By a few, in a season how many do you mean?

A. Well, I think we handled something like a thousand, fifteen hundred barrels for them. We had twenty or thirty of those.

Q. Out of a thousand or fifteen hundred twenty or thirty? A. Something like that, yes.

Q. You haven't the exact figures before you?

A. No, I haven't; I could not say.

Mr. SPENCER.—That is all.

Witness excused. [194]

Testimony of Harry E. Larson, for Plaintiff.

HARRY E. LARSON, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SPENCER.)

Mr. Larson, where do you live?

A. Seattle, Washington.

Q. And what is your business?

A. I am agent in charge of the Spokane Street Terminal.

COURT.—Spokane Street Terminal?

A. Which includes the cold storage, ice and fish plants.

Q. And what is that? Is that a municipal plant?

(Testimony of Harry E. Larson.)

A. Yes, sir.

Q. Of the City of Seattle?

A. Of the Port, District of King County.

Q. Of the Port, District of King County. And how much experience have you had in handling cold-storage plants?

A. About twelve years. Seven years with the Port of Seattle, and several years back east; four or five years back east.

Q. The business that you handle in the Port of Seattle, does that include the receiving and storing of fruits?

A. We handle fruit for about—to twenty thousand barrels of loganberries, strawberries and raspberries each season.

Q. How is that fruit packed, or where is it packed?

A. Why, some of it is packed in Sumner, Puyallup, Vashon Island, Bainbridge Island, and some of it at our plant.

Q. Some of it at your plant? A. Yes.

Q. Now, take the fruit that is brought in and packed at your plant, what distance would it be brought in from?

A. Well, most of that is brought in by boat and by truck direct from the [195] fields. It is picked one day and brought in during the night and packed in barrels the following day and put into the cold-storage plant.

Q. Put into the cold-storage plant the second day after it is picked?

(Testimony of Harry E. Larson.)

A. The second day after it is picked.

Q. And do you know of the distances that it may be trucked in from?

A. Why, the longest distances probably would be about thirty-five miles.

Q. And you are speaking now of berries that are picked and trucked in before they are packed, are you?

A. Well, that would be including the barreled berries.

Q. I see. That is the longest distance, about thirty-five miles? A. About thirty-five miles.

Q. Those trucks that bring in the berries there to your plant, are they covered trucks or uncovered trucks, or how are they?

A. Some are covered and some are uncovered.

Q. Some of the berries are exposed to the sun as they are trucked in?

A. Yes, there are some barreled berries come in there without anything on them, any awnings on the trucks.

Mr. BOOTHE.—If the Court please, I object to testimony about what they do over in Seattle. What we do in Portland is what we want to find out about. What he knows about this business I don't object to, but over in Seattle has nothing to do in this case, unless directed to proving custom, and there is no custom alleged here.

Mr. SPENCER.—I am merely qualifying the witness as to his experience he has had. I am through with that.

(Testimony of Harry E. Larson.)

Mr. BOOTHE.—Is that all you want to show, the experience?

Mr. SPENCER.—Yes, as to handling it.

Q. Now, Mr. Larson, what, in your experience in the handling and operating of a cold-storage plant, is the necessary temperature in order [196] to preserve fruits like loganberries from fermentation and spoiling?

A. My experience shows that the heat must be taken out of the berry by putting in cold storage at a low temperature for anywhere from three to ten days. We carry them as low as five above zero. Then the temperature is later raised not to exceed twenty-five degrees.

Q. What would be the effect upon loganberries if the temperature was allowed to go to thirty-six degrees and remain around that point for four or five or six days?

A. If the berry had been properly cooled in the first place it would take a number of days for the temperature to get up to thirty-six degrees, even though the refrigeration in the room was cut off entirely. The fact that the volume of goods in the room, with a well-insulated room, would refrigerate the room for a certain length of time. It would be a slow process before it would go up to thirty-seven degrees. As a matter of fact the goods would have to gradually thaw out until it got that temperature.

Q. But if they had not been properly frozen at the outset, and adding to that the proposition of moving in new berries from the outside day by day

(Testimony of Harry E. Larson.)

and the temperature were permitted to go to thirty-six and remain for four or five days, what would be the effect on the berries?

A. There would be a slow process of fermentation and the higher the temperature the quicker the process would be.

Q. What is the practice in operating cold-storage plants as to noting on the receipts when the goods are received as to any bad order barrels?

A. There is a notation put on all warehouse receipts as to the condition of the barrels. It may be staves, they may be head broken,—a head may be broken while the contents may be O. K. If the contents are in bad order such a notation should be made on the warehouse receipt. [197]

Q. Mr. Larson, what have you to say as to the extent of the business of dealing in barreled goods, that is, packed in barrels and placed in cold-storage plants and then shipping to various points by refrigerator-cars?

A. It is now one of the largest industries on the Pacific Coast.

Mr. SPENCER.—You may cross-examine.

Cross-examination.

(Questions by Mr. BOOTHE.)

Suppose, Mr. Larson, that the goods came to the cold-storage plant in a fermenting condition, such a condition that sometimes a barrel blowed up, and they are put into the freezer and frozen. Now, what effect does the freezing have on them?

A. Retards fermentation.

(Testimony of Harry E. Larson.)

Q. Just holds them there, does it?

A. It holds them; won't cure it.

Q. And if they are fermented when they come in there are they ruined?

A. No; they would not be as good as if they were fresh and not fermented. There would be a small amount of damage there. It all depends upon the amount of fermentation when those are sent in.

Q. Those can be freshened up, you said?

A. No, they cannot be freshened up after they once ferment.

Q. How is that?

A. No, they cannot be freshened up after they are once fermented; they cannot be freshened up after they are once fermented.

Q. Are they ruined?

A. They may not be ruined; it might be a slow fermentation and still they would not be ruined.

Q. They would be marketable goods, yet would they?

A. Marketable goods; they would not be first-class goods. There would be a certain amount of deterioration.

Q. That is what I am getting at. Then you would not say that because they fermented that they were ruined—absolutely ruined? [198]

A. All depends upon the amount of fermentation. If full fermentation has set in they are practically ruined; if there is only slight fermentation they would still have a market value.

Q. If they came into the cold-storage plant in a

(Testimony of Harry E. Larson.)

fermenting condition and by some reason or other the temperature went up and they began to ferment again, could you tell which fermentation caused the damage, or whether one fermentation caused more damage than the other?

A. The first fermentation would cause a certain amount of damage and the second one would increase it.

Q. It would increase it. Now, then, could you tell in such an intelligent way that the jury could fix the damages if it was stated to you *that came* into the cold-storage plant in a fermenting condition and then while so—that is, so that the barrels could be heard sizzling, and then after they were frozen they began to ferment again, can you tell, supposing that the cold-storage plant were liable for that second fermentation, can you tell how much the damages would be?

A. No, I would say that if the barrels came in fermenting, the cold-storage plant had a notation on the warehouse receipt to cover that, they would not be responsible, practically in no degree.

Q. They would not be responsible for any damages if they fermented again?

A. If it was covered by notation on the warehouse receipt.

Q. Suppose they were not on the warehouse receipt, but the owner of the goods were notified, that would be the same thing?

A. After he has got his warehouse receipt an additional notification would be worthless.

(Testimony of Harry E. Larson.)

Q. Well, a warehouse receipt, negotiable warehouse receipt going into the hands of a third party, that might have some effect on it, but so long as the owner of the goods holds the warehouse receipt and he is notified that those goods were fermenting when they came in there, he has knowledge of the fact and that would not make any difference, then, whether noted on the warehouse receipt or not, would it? [199] A. Yes, it would.

Q. Why would it make any difference?

A. Well, it may be neglect of the plant.

Q. I know. You don't get my question. Maybe I don't make myself clear. Goods coming in at night, different times, we will say. A. Yes.

Q. Night watchman received them. They are dumped off on the platform there, he gives a receipt for so many barrels, he does not know whether they are all good or not, but after they have gone away and cooled down and things settle down a little bit, things stop, he hears sizzling and he notifies the owner of the goods that some of those goods that came in there were fermenting when they came in there. He receipted for so many barrels without saying anything about the condition, we will say, but he notified the owner of those goods they were in a fermenting condition when they were delivered there; does that protect the warehouse plat?

A. If he notified them the same day or following morning I would say it holds good, but the cold-storage plant that is paid for expert service should

(Testimony of Harry E. Larson.)

not leave a night watchman to receive goods of a perishable character. They should leave somebody in charge for receiving goods at night that could give an intelligent receipt.

Q. Do you receive them at night over there?

A. Oh, yes, we leave a man in charge at nights during the berry season that is qualified to examine the goods.

Q. Receive that at all times, night and day?

A. At all times. It is necessary during the berry season; it is only a short time of one month or six weeks, and during that period we do.

Q. Have you ever had any of those loganberries come into your place in a fermenting condition.

A. Get barrels; get quite a few; every once in a while get barrels. There are several ways that may be caused.

Q. Barrels ever blow up on you?

A. We have had a few. I will show you how that may be caused? [200] In the fields, the berry fields, the berries are picked during the day; the truck comes along and picks them up at a certain time, maybe in the evening and after they get through picking, and pickers may go out and work until dark and pick an additional lot of crates. Now, those crates are carried over until the next day and would be shipped to the plant and there would be a small amount of berries there that had been picked the day previous, which would be in poorer condition than the berries that were picked during the current day and it would account

(Testimony of Harry E. Larson.)

for a few berries being in poorer condition than the balance.

Q. Now, is it a proper thing, in putting those berries into barrels, to mash them down or mash them up or pulp them.

A. On our terminal there we are packing at the present time about ten thousand barrels of strawberries; we take a big pole and stick it down into the barrel and jam them around, stir them around, in order to get them to work their way down and fill the barrel completely, and then there are more berries poured in.

Q. Mash them up then? A. Mash them up.

Q. Is that likely to cause them to ferment any quicker?

A. No, it doesn't; we have wonderful success with the handling of them.

Q. Then, if they are hauled by trucks over a rough road any distance, would that cause them to ferment?

A. Well, if it is hauled in the sun it would not do them any good. As far as the shaking of the barrel, I don't think it would have anything to do with it at all. If they were left out, exposed to the sun any great length of time, there would be a certain amount of heat added to the barrel which would have to be taken out after the goods were put in storage.

Mr. BOOTHE.—That is all.

(Testimony of Harry E. Larson.)

Redirect Examination. [201]

Q. Mr. Larson, as I understand it, berries that are completely fermented, are they or are they not ruined? A. They are absolutely ruined.

Q. And is the permitting of the temperature of a cold-storage room to go to thirty-six and stay there four or five days apt to completely ferment berries which have not been frozen down to the degree that you have mentioned?

A. It would be very likely to.

Mr. SPENCER.—That is all.

Recross-examination.

Q. Now, what do you mean by completely fermented?

A. Be fermented to such a degree that they would not be fit for human consumption. Just the same thing, might take a bowl of strawberries at home and a certain amount of fermentation set in and while it was so that you could not eat it, but if you left it set around a long time it would get so sour you would not care to eat it, it would not be fit for consumption.

Q. Now, if these barrels of berries came to the cold-storage plant in a fermenting condition, so that you could hear them sizzling, would you say that they were destroyed?

A. Not necessarily destroyed, but you could ascertain the amount of damage done by tasting them.

Q. Then if they were frozen they would be merely held, as I understand you, in their condition?

(Testimony of Harry E. Larson.)

A. They would be in the same condition after they were frozen as they are before. You would still have that fermentation in that particular barrel; it would still be there. Just the same with a fish that is partly spoiled and freeze it up, you cannot bring back its original state.

Q. How long would it take to freeze those barrels through they [202] had fermented?

A. After they had fermented it takes about—well, it doesn't make any difference whether they are fermented or not.

Q. I didn't catch you.

A. It doesn't make any difference whether they are fermented or not fermented; there is so much heat that had to be extracted from that barrel to bring it down to a frozen condition.

Q. How long would it take to do that?

A. It would take ten days to two weeks.

Q. Well, during the time you are freezing them, when they come in fermenting, during the time you are freezing them or reducing that heat, they are still fermenting, are they not, until they get so cold?

A. No, not necessarily fermenting. You take the heat out of them and you have stopped the fermentation.

Q. Well, take a barrel in a fermenting condition, put it into a freezer, how long will it continue to ferment until it stops?

A. Well, it would slightly ferment until the majority of the heat is brought out of the barrel.

(Testimony of Harry E. Larson.)

Q. You don't know how long that would be?

Q. Well, it would require a technical examination to bring that out.

Q. In any event there would be some fermentation going on in the berries until they are chilled?

A. Yes, sir.

Witness excused.

Mr. SPENCER.—I would like to read two depositions, your Honor, now. I think the stipulation is attached to the original; anyway there is no question about it. I will omit the stipulations and the preliminary things. I suppose I may take the witness-stand here? [203]

COURT.—Yes.

Mr. SPENCER.—Will it be agreeable if I read the questions and answer?

Mr. BOOTHE.—We stipulate that any objections might be taken at the trial?

Mr. SPENCER.—I will keep my eye on you and if you want to object—

Mr. BOOTHE.—Yes, you watch me, now.

Mr. SPENCER.—I will do that. These are two depositions, gentlemen, taken in Chicago on behalf of the plaintiff, in which Mr. Eley represented Mr. Baker and Mr. Boothe was back there representing the defendants. (Reads deposition.)

Deposition of Matthew H. Theis, for Plaintiff.

“MATTHEW H. THEIS, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

(Deposition of Matthew H. Theis.)

Direct Examination.

“(By Mr. ELEY.)

“Q. What is your name?

“A. Matthew H. Theis.

“Q. Where do you live, Mr. Theis?

“A. 4204 North Lincoln Street, Chicago, Illinois.

“Q. How old are you, Mr. Theis?

“A. Thirty-six years.

“Q. What is your business?

“A. Buyer for John Sexton & Company, wholesale grocers.

“Q. Where are John Sexton & Company located?

“A. 352 West Illinois Street, Chicago, Illinois.

“Q. Their business is what?

“A. Wholesale groceries.

“Q. How long have you been associated with or employed by John Sexton & Company?

“A. Since 1903.

“Q. What are your specific duties at the present time? [204]

“A. I have a varied line of goods to buy, as well as charge of the manufacturing of numerous articles, like jams, jellies, preserves, pickles, the packing of olives and ketchup, and quite a few other lines.

“Q. Is that manufacturing business carried on in Chicago?

“A. Yes, sir, at 352 West Illinois Street.

“Q. And you have direct charge and supervision of that, have you? A. Yes, sir.

“Q. Well, now, have you had any experience in

(Deposition of Matthew H. Theis.)

handling fruit such as strawberries, loganberries, raspberries and such things, packed in barrels or containers in what is known as cold pack?

“A. Yes.

“Q. Have you ever had any experience in handling loganberries in barrels in what is considered cold pack? A. Yes, sir.

“Q. Over what period of time does your experience extend? A. About eight years.

“Q. You have had experience in preserving, manufacturing preserves from fruits and berries, have you? A. Yes, sir.

“Q. Over what period of time?

“A. About eight years.

“Q. In Chicago? A. In Chicago, yes.

“Q. Have you any experience in the manner of transporting or conveying these fruits from the farm or place where they are grown to the place of packing?

“A. I have knowledge of the way they are transported.

“Q. Well, do you know how they are transported? A. Yes, I do, yes.

“Q. Where do most of the fruits that you pack, such as loganberries, strawberries and raspberries come from, Mr. Theis?”

Mr. BOOTHE.—That I object to, your Honor; that has nothing to do with this case; that is Illinois.

COURT.—The loganberries came from the Northwest? [205]

(Deposition of Matthew H. Theis.)

Mr. SPENCER.—Yes, he says from the Northwest.

COURT.—Go ahead.

Mr. SPENCER.—(Continues reading deposition:)

“Well, the loganberries come from the Northwest; the strawberries come from Michigan, Tennessee, Louisiana, California and Washington.

“Q. Well, are those berries, such as loganberries, strawberries and raspberries, shipped to you for your manufacturing in what is known as refrigeration conveyance, or are they shipped just as they are taken from the field or bushes?

“A. Well, speaking of barrel goods now?

“Q. Yes, barrel goods.

“A. They are shipped in refrigerator-cars.

“Q. Well, have you had any experience in getting them from the field in boxes or packages as they are taken right from the field?

“A. Yes, we have quite often.

“Q. How long does it usually take to transport them from the field to the factory, to your factory for instance?”

Mr. BOOTHE.—That I object to.

COURT.—I suppose it is qualifying him as an expert.

Mr. SPENCER.—That is the intention.

Mr. BOOTHE.—Oh, he is qualifying him as an expert now. All right.

Mr. SPENCER.—I think that is the object of it.

COURT.—Go ahead.

(Deposition of Matthew H. Theis.)

Mr. SPENCER.—(Continues reading deposition:)

“A. About two days, forty-eight hours.

“Q. Where from does it take two days?

“A. Well, from Michigan for instance.

“Q. In your experience, Mr. Theis, have you ever had any trouble with fruit spoiling such as raspberries and strawberries, where they are [206] shipped from the field to your factory, not in cold-storage containers?

“A. No, I have not, not after they arrived; some they have carried as long as three days and we have not had any trouble, but beyond that, why, there is a softness.

“Q. They might or might not be in good condition? A. Yes.

“Q. When berries are shipped from Michigan how are they usually shipped? A. By boat.

“Q. Well, what kind of containers are they usually? A. In wood cases.

“Q. Do you ever get any in barrels in what is called cold pack?

“A. Yes, we have had some in barrels, we have had cold pack shipped from Michigan over here on boats without any refrigeration.

“Q. Are they usually shipped, Mr. Theis, in refrigerator-cars or are they not?

“A. From Michigan?

“Q. Yes. A. No, they are not.

“Q. What is the shortest time, Mr. Theis, that fruit can be shipped from Michigan to Chicago?

“A. Well, from the time you ship it, you mean

(Deposition of Matthew H. Theis.)

from the time it leaves the field or from the time it leaves the dock?

“Q. From the time it is picked, for instance?”

“A. Well, it takes two days before they get it in cold storage.

“Q. Have you had any trouble in your experience in handling fruit that is received by you here two days from the time of picking? A. No.

“Q. Now, Mr. Theis, have you had any experience in handling cold pack fruit, particularly loganberries, in cold storage? A. Yes, sir. [207]

“Q. Over a period of how many years have you had experience in that?

“A. The same number of years, about eight years.

“Q. Do you or do you not use loganberries every year? A. We do every year.

“Q. Where are loganberries grown, if you know?

“A. Well, they are grown in different sections, I could not just tell you what part of the states, but Oregon I think grows some loganberries.

“Q. Have you ever bought any loganberries, or has your firm ever bought any loganberries from the plaintiff in this case, H. A. Baker?

“A. Yes, sir.

“Q. Did you purchase any, did your firm purchase any loganberries of H. A. Baker during the year 1920? A. Yes, sir.

“Q. How many barrels, or what quantity did you purchase? A. Two hundred barrels.”

(Deposition of Matthew H. Theis.)

Mr. BOOTHE.—That is what I object to, your Honor. Is it any part of these berries?

COURT.—Part of the same berries that were in cold storage at the time these were said to be damaged, I suppose.

Mr. SPENCER.—They are.

Mr. BOOTHE.—It does not say so here.

Mr. SPENCER.—(Continues reading deposition:)

“Q. Of loganberries?

“A. Well, we bought—yes, two hundred barrels.

“Q. What price did you pay for those, what was the price?

“A. I have not got the invoices here, I don't recollect just what that was; if I remember right it was around 17½¢ a pound f. o. b. cold storage.

“Q. That is f. o. b. cold storage Pacific Coast?
[208]

“A. No, I can't recollect just what warehouse had them without the warehouse receipt.

“Q. Now, Mr. Theis, you have had berries packed in what you call cold pack, in cold-storage warehouses in the City of Chicago, have you?

“A. Yes, sir.

“Q. Have you any custom or regular requirements for temperature in which such goods shall be kept by the cold-storage companies?

“A. Yes, sir, we have instructions both at our plant and also at the cold-storage houses not to let the temperature get above 26 degrees.

(Deposition of Matthew H. Theis.)

“Q. And in your experience what is the usual and customary temperature at which such fruit is kept by cold-storage companies, Mr. Theis?

“A. Twenty to twenty-six degrees.

“Q. When the fruit is kept stored in a temperature of 26 degrees or less, have you ever experienced any loss of such fruit by fermentation or otherwise? A. No, sir.

“Q. And in your opinion and from your experience as a manufacturer and in the handling of berries, is that a proper temperature at which to keep and store such fruit? A. Yes, sir.

“Q. And in your opinion is that a proper temperature at which to keep loganberries packed in barrels in what is known as cold pack, is that right? A. Yes, sir.

“Q. And in your opinion and from your experience have you ever had any loss of loganberries packed in cold pack when kept in a temperature of 26 degrees or under? A. No, sir. [209]

“Q. Have you ever had any experience with loganberries kept in barrels in what is known as cold pack where the temperature was above 26 degrees?

“A. Well, we never let our temperature get above 26 degrees.

“Q. Have you an opinion as to what would happen to fruit and particularly loganberries packed in barrels in what is known as cold pack, if the temperature was allowed to get above 26 degrees?

“A. Yes, it ferments if it gets above 26 degrees.

(Deposition of Matthew H. Theis.)

“Q. Well, at what temperature above 26 degrees, in your opinion, and from your experience, do you think that they would be subject to fermentation?

“A. Well, after it got around 32 or 35 degrees it would ferment; if it got above 32 degrees they would spoil.

“Q. How can you tell when fermentation occurs in barrels of fruit such as loganberries and strawberries?

“A. Well, the barrels would show signs of distress, like swelling of the heads or bulging of the heads, also leakage on the staves.

“Q. What is that due to, what causes the process of swelling of the heads?

“A. It is gas caused by fermentation.

“Q. Can fermentation occur without forming gas, in your opinion? A. No, it cannot.

“Q. Now, Mr. Theis, you said that you bought, your company bought loganberries of Mr. Baker in 1920. What did you buy them for, what purpose?

“A. For manufacturing high grade preserves and soda fountain fruit.

“Q. Well, if those loganberries started to ferment, or were slightly fermented, could you use them for the purpose for which you purchased them? A. No, sir. [210]

“Q. What can they be used for if anything when the loganberries are fermented?

“A. We could not use them at all in our business.

(Deposition of Matthew H. Theis.)

“Q. Well, what would you do with them?”

“A. We would have to try to salvage them.

“Q. Would the pure food law or authorities permit you to use them?”

“A. Well, that is a question I can't answer.

“Q. You in your experience do not use them, is that right?”

“A. No, we would not use them, and we do not use them if they show any signs of fermentation.

“Q. Now, getting back to this two hundred barrels of loganberries that you purchased of H. A. Baker in 1920, what time in the year did you buy them?”

“A. I bought them in the early part of the year on a future contract; I don't quite remember just when.

“Q. What did you buy them for?”

“A. For the manufacture of jams and preserves and soda fountain fruit.

“Q. Did you receive all or any part of this two hundred barrels of loganberries from Mr. Baker?”

“A. Yes, sir.

“Q. When did you get them?”

“A. Well, they were transferred to our account in August some time, I will give you the exact date when I get the invoice; and we ordered them out later, in the month of November.

“Q. 1920? A. 1920.

“Q. What do you mean by ordering them out?”

“A. Well, we issued orders to the warehouse to

(Deposition of Matthew H. Theis.)

ship us one hundred barrels of the two hundred that they had there in their place.

“Q. Did they ship them?

“A. They did ship one hundred barrels. [211]

“Q. What warehouse was this order on?

“A. The National Cold Storage and Ice Company.

“Q. Of what city? A. Portland, Oregon.

“Q. And do you know when you received those, or when your company received those goods, this one hundred barrels?

“A. Yes, sir, we received them some time in November. As I say, I will get the exact date when I get the invoice.

“Q. Well, did you examine these goods personally when they arrived in Chicago?

“A. I did, yes.

“Q. Where did you examine them?

“A. I examined them at our warehouse at 352 West Illinois Street.

“Q. Is that a cold-storage warehouse?

“A. Yes, sir.

“Q. And what degree of temperature do you keep that storage warehouse in?

“A. We keep that most of the time around 20; not above 26.

“Q. Do you remember the day that you examined these goods, or about the date you examined them?

“A. Well, it was the day after the goods arrived in the warehouse.

(Deposition of Matthew H. Theis.)

“Q. What condition did you find them in?

“A. Well, they were fermented; they showed signs of leakage; they were stained all around, and when they opened the head why it blew the top off the barrel, when we loosened up the staves it just blew the top right off.

“Q. You say that when you loosened the hoops on the barrels that the heads would blow out from the gas and fermentation of the berries; do you mean to say that all of them did that?

“A. All that I examined.

“Q. About how many did you examine of the one hundred lot? A. I examined five barrels.

“Q. How were those barrels picked, at random?

“A. They were picked out of the lot at random, no specification given, just five barrels out of the lot. [212]

“Q. How did the balance of the lot appear from observation of the outside appearance of the barrels? A. Well, they were all the same way.

“Q. Were they all swelled?

“A. All that we saw; we didn't look at the entire one hundred barrels, you understand; they were swelled and the barrels stained.

“Q. Is there a custom among the trade in Chicago, Illinois, with reference to the selection of barrels or packages to be examined in a case of that kind?

“A. Why, yes, they take a certain number of barrels of cases, whatever is being examined, out of a car lot or a lot at random.

(Deposition of Matthew H. Theis.)

“Q. Your answer is yes, is it? A. Yes.

“Q. What is that custom?

“A. Well, they pick out a certain number of cases or barrels from the lot at random.

“Q. And if those cases or barrels which they select from these goods to be examined show a product to be in good condition, they take the lot as being in good condition, do they? A. Yes.

“Q. And if the barrels or cases that they examine show the product to be in poor or bad condition, they take the whole lot to be in a similar condition, is that right? A. Yes, sir.

“Q. And trades and deals are closed according to custom on that practice and theory, are they?

“A. Yes, sir.

“Q. Now, what did you do with these loganberries that you received from Mr. Baker at this time?

“A. Why, we left them in the warehouse in cold storage and notified [213] Mr. Baker of the condition of the barrels, sent him a wire.

“Q. What was the price you paid for these berries?

“A. 17½¢ per pound f. o. b. Portland, Oregon, January 8, 1920.

“Q. Well, your company rejected these goods, did they? A. Yes, sir.

“Q. For what reasons, if any?

“A. Well, they rejected them for the reason that they were fermented and unfit for use.

“Q. How did you dispose of them?

(Deposition of Matthew H. Theis.)

“A. We have 120 barrels still down in the warehouse.

“Q. What are they worth?

“A. They are not worth anything to us.

“Q. Mr. Theis, in the handling of loganberries and other berries, packed in barrels in the manner known as cold pack, have you ever before or since had any trouble or found them fermented?

“A. You mean this particular lot?

“Q. From Mr. Baker, yes, I meant to include that, berries purchased from H. A. Baker?

“A. Never had any trouble before or since.

“Q. That is the only lot of berries or fruit that you ever purchased from Mr. Baker that you have had any trouble with, is it? A. Yes, sir.

“Q. Covering the period of how many years that you have been buying fruit of Mr. Baker?

“A. Well, eight years.

“Q. Now, Mr. Theis, can you tell us now, what date it was that you had that 100 barrels transferred to you, to your Company?

“A. July 29, 1920; that is, transferred from H. A. Baker to John Sexton & Co., covered by warehouse receipt number 224.

“Q. Issued by what company?

“A. National Cold Storage and Ice Company, 309 East Washington Street, Portland, Oregon. [214]

“Q. Now, Mr. Theis, these barrels were transferred to you in the cold-storage warehouse at Portland, Oregon, and kept for you there until November of that year, is that right?

(Deposition of Matthew H. Theis.)

“A. November, 9, 1920, I ordered out 100 barrels; December 3 was the date of the shipping bill; the date the railroad shipped the goods, or received the goods from them was December 3. Wait a minute,—that is the date of the bill, that is not the date that they were shipped. November 16th they were shipped from the warehouse.

“Q. In Portland, Oregon? A. Yes, sir.

“Q. When did you receive them here in Chicago from the railroad?

“A. December 3 is the date of the freight bill; about December 3d.

“Q. Mr. Theis, do you know, or have you any records indicating the condition of these barrels and berries at the time they were received by the Railroad Company and turned over from the warehouse, cold storage company, to the Railroad Company?

“A. I haven't got the record here, but I know that the bill of lading was marked, showed that the barrels were stained, and the Railroad Company made a notation on their bill of lading that the barrels were stained.

“Q. Do you know when you received them here in Chicago, Mr. Theis? If so, state.

“A. I don't know the exact date. As soon as I get it from the records that I have over at the office I can tell you, if you want the specific date, but I can't give it to you, but it was about December 3d.

“Mr. BOOTHE.—Q. Received by you?

(Deposition of Matthew H. Theis.)

“A. Received at the warehouse. The goods are always shipped direct to the cold storage from the cold storage.

“(Document marked Plaintiff’s Exhibit One for Identification.)

“Mr. ELEY.—Q. I hand you what purports to be a freight bill of the Chicago & Northwestern Railway Company, marked Plaintiff’s [215] Exhibit One for Identification, and ask you what that is.

“A. It is an expense bill for freight covering 100 barrels of loganberries shipped from the National Cold Storage & Ice Company of Portland, Oregon, to the John Sexton & Co., care of the Union Cold Storage Warehouse, 16th and State.

“Q. Is that the freight bill for the freight on the 100 barrels of berries that you have been just testifying about? A. Yes.

“Mr. ELEY.—I will offer it in evidence and ask that it be marked Plaintiff’s Exhibit One.

“Said document is attached hereto and made a part hereof and marked Plaintiff’s Exhibit One.”

Mr. SPENCER.—The document is attached and marked Plaintiff’s Exhibit One. That is to the original.

COURT.—It is merely the freight bill?

Mr. SPENCER.—Yes. (Continues reading deposition:)

“Q. Mr. Theis, after examining this freight bill, have you anything to say as to the place where you examined these goods in connection with the

(Deposition of Matthew H. Theis.)

evidence that you have heretofore given, wherein you stated that you had examined them at your warehouse?

“A. They were examined, the five barrels that we picked out from the lot, we picked five barrels at random and hauled them over to our cold storage, and opened up the barrels and found them in that condition. I might add this, that the rest of the barrels also were fifty to sixty pounds short in weight all the way through the lot.

“Q. Due to what, in your opinion?

“A. Due to fermentation and loss from leakage, caused by gas, and bursting the heads and springing the staves.

“Q. Now, have you the bill of lading covering that 100 barrels of loganberries? [216]

“A. Yes, sir.

“Q. I hand you what purports to be a bill of lading issued by the Union Pacific Railway Company, marked Plaintiff’s Exhibit 2 for Identification, and ask you if that is the bill of lading that covers these 100 barrels of loganberries that you have just been testifying about? A. Yes, sir.

Mr. ELEY.—I ask that that be marked Plaintiff’s Exhibit 2 and attached to the deposition.

“Document marked Plaintiff’s Exhibit 2, and same is attached hereto and made a part hereof.”

Mr. SPENCER.—Is that attached to the original?

COURT.—I suppose it is attached here; I don’t know. Yes.

(Deposition of Matthew H. Theis.)

Mr. SPENCÉR.—Does that have any notations on it?

COURT.—“All barrels stained” it says.

Mr. SPENCER.—And that is the bill of lading, as I understand it, issued by the railroad company to the National Cold Storage and Ice Company.

COURT.—Issued to the National Cold Storage and Ice Company.

Mr. SPENCER.—I will offer that bill of lading as evidence as part of the deposition, the bill of lading issued by the Railroad Company to the National Cold Storage and Ice Company.

Mr. BOOTHE.—Do you want to read it?

Mr. SPENCER.—I didn't know whether it was in evidence or not. It is attached. I think I will not take time to read it. The witness referred to it already in his testimony. It shows the witness did refer to these barrels as stained. (Continues reading deposition:)

“Q. Now, Mr. Theis, were there any identification marks on these barrels, or any of them, such as numbers?

“A. I have a letter here from the National Cold Storage and Ice Company, which finishes up by saying, ‘We are returning the schedule of [217] barrels which should be attached to said receipt, which shows the numbers of the barrels shipped, checked in red.’ And we had 200 barrels out there, and they shipped us 100 of the 200, and the barrels that they shipped us they checked in red. That is attached right here, these are the barrel numbers.

(Deposition of Matthew H. Theis.)

“(Said document was marked Plaintiff’s Exhibit 3 for Identification, three sheets.)

“Q. Now, Mr. Theis, I hand you a letter marked Plaintiff’s Exhibit 3 for Identification, and ask you where you received that, where you got it, if you ever saw it before?

“A. I received that in reply to my request from the National Cold Storage and Ice Company at Portland, Oregon.

“Q. Did you get that through the regular course of mail? A. Yes, sir.

“Q. And was the exhibit with the numbers on, attached to that letter, received at the same time, in the same enclosure, the same envelope?

“A. Yes, sir, they were received at the same time. I imagine they were in the same envelope.

“Q. Did you compare the numbers on these 100 barrels with the numbers checked on this list, or did you have it done?

“A. Yes, I had it done in the office.

“Q. Are these the numbers as shown by this list in red, that appear on the barrels, on these 100 barrels that you have been testifying about?

“A. Yes, sir.

“Q. Now, Mr. Theis, about how many barrels of loganberries a year do you handle?

“A. We probably handle from one to three hundred barrels, it depends on the season.

“Q. How many barrels of other fruits do you handle, such as strawberries, raspberries and blackberries? [218]

(Deposition of Matthew H. Theis.)

“A. Ten or twelve cars, consisting of 100 barrels to the car; besides a lot of other fresh fruits in cases.

“Q. Now, Mr. Theis, in your opinion, if these loganberries about which you have testified had been kept in a temperature of 26 degrees or less, would they have fermented or spoiled in any way whatever? A. I don't think so.

“Q. How long in your opinion would loganberries, particularly, or any other fruit, such as strawberries and raspberries, keep in barrels in the method that is called cold pack, if kept in a temperature of 26 degrees or less?

“A. Well, if kept at that temperature they keep from fermenting as long as you keep them in there.

“Q. Well, how long would they keep good?

“A. They would lose their color a little bit, but they would keep as long as they were left in there.

“Q. Would there be any other sign of deterioration, if any, except as to color? A. No.

“Q. Mr. Theis, from your experience in the handling of fruit, berries, particularly loganberries, if loganberries were picked during the months of July and August in the State of Oregon, in the neighborhood of Salem, Oregon, and were packed during the afternoon or evening of the same day in which they were picked from the bushes, and within six or seven hours after they were packed in barrels they were transported and placed in cold storage, what would be the condition of those berries as to fermentation?

“A. There would be no fermentation.